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Hocus-Pocus: Look, But Do Not See!

A comparative analysis of the transparency rules and their failure to fight corruption in the Bulgarian public procurement system

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Hocus-Pocus: Look, But Do Not See!

A comparative analysis of the transparency rules and their failure to fight corruption in the Bulgarian public procurement system

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 19 November 2015 at 12.45 hours

by

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To my grandfather Prof. Dr. I. Kutchukov

Wherever you are, thank you for the inspiration!

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Abbreviations

ANAO	the Bulgarian National Audit Office Act (*Закон за сметната палата*), promulgated SG 12/12.2.2015, as amended
AO	the Austrian Audit Office (*Rechnungshof*)
APCA	the first Bulgarian Award of Procurement Contracts Act, promulgated SG 9/3.1.1997, repealed SG 56/22.6.1999
APFIA	the Bulgaria Public Financial Inspection Act (*Закон за държавната финансова инспекция*), promulgated SG 33/21.4.2006, as amended
BAK	the Austrian Federal Bureau of Anti-Corruption (*Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung*)
BAKG	the Austrian Federal Law on the Establishment and Organisation of the Federal Bureau of Anti-Corruption (*Bundesgesetz über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptions-bekämpfung*), promulgated BGBl I No. 72/2009, as amended
BBG	the Austrian Federal Public Procurement Agency (*Bundesbeschaffung GmbH*)
BHO	the German Federal Budget Code (*Bundeshaushaltsordnung*), promulgated BGBl. I S. 1284 / 19.8.1969, as amended

BIAC to OECD	the Business and Industry Committee to the OECD
BKMS	the German Business Keeper Monitoring System
BORKOR	the Bulgarian project BORKOR (*БОРКОР*), launched under the aegis of the Minister of Interior and the Deputy Prime Minister in 2009.
BVergG	the Austrian Federal Procurement Act (*Bundesvergabegesetz*), promulgated BGBl. No 17/2006, as amended
CM	the Council of Ministers of Bulgaria (*Министерски Съвет*)
CMS	the Bulgarian Corruption Monitoring System of the Center for the Study of Democracy
CPB	Central Purchasing Body, as defined in Article 1(10) of Directive 2004/18/EC and Article 2(16) of Directive 2014/24/EU
CPC	the Bulgarian Commission for Protection of Competition (*Комисия за защита на конкуренцията*)
CPCCOC	the Bulgarian Center for Prevention and Countering Corruption and Organised Crime (*Център за превенция и противодействие на корупцията и организираната престъпност*), established by decree of the Council of Ministers on 29.7.2010
CPI	the Corruption Perceptions Index of Transparency International

CPV	the Common Procurement Vocabulary, provided for in Regulation (EC) No 2195/2002 of the European Parliament and of the Council as the reference nomenclature for public contracts
CSD	the Center for the Study of Democracy (*Център за Изследване на Демокрацията*, founded 1989 in Sofia, Bulgaria as an interdisciplinary public policy institute dedicated to the values of democracy and market economics
Directive 2004/17/EC	European Parliament and Council Directive 2004/17/EC on procurement procedures of entities operating in the water, energy, transport and postal services sectors and European Parliament, OJEU L 134/1, 30.4.2004
Directive 2004/18/EC	Council Directive 2004/18/EC on procedures in public works contracts, public supply contracts and public service contracts, OJEU L 134/114, 30.4.2004
Procurement Directives	collective reference to Directive 2004/17/EC and Directive 2004/18/EC
Directive 2014/24/EU	Directive 2014/24/EU of the European Parliament and of the Council of 26.2.2014 on Public Procurement and repealing Directive 2004/18/EC, OJEU L 94/65, 28.3.2014
Directive 2014/25/EU	Directive 2014/25/EU of the European Parliament and of the Council of 26.2.2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and repealing

	Directive 2004/17/EC, OJEU L 94/243, 28.3.2014
ECJ	the European Court of Justice
ESPD	the European Single Procurement Document under Article 59 of Directive 2014/24/EU
EU	the European Union
EU Commission	the European Commission
First PPA	the first Bulgarian Public Procurement Act, promulgated SG 56/22.6.1999, repealed SG 28/2004
GATT	the General Agreement on Tariffs and Trade, signed in Geneva on 30.10.1947
GDP	Gross Domestic Product
GRECO	the Group of States against Corruption, established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards
GWB	the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), promulgated Federal Gazette I p. 2546 of 26.8.1998, as amended
IACA	International Anti-Corruption Academy, initiated by UNODC, OLAF and the Republic of Austria in 2010
IMK	the Standing Conference of the Ministers and Senators of the Interior of the *Länder* in the Federal Republic of Germany
MEET	the Bulgarian Minister of Economy, Energy and Tourism (*Министър на*

	икономиката, енергетиката и туризма)
NAO	the Bulgarian National Audit Office (*Сметна палата*)
New Procurement Directives	collective reference to Directive 2014/24/EU and Directive 2014/25/EU
OECD	the Organisation for Economic Co-operation and Development, founded in 1961 to stimulate economic progress and world trade
OJEU	Official Journal of the European Union
OLAF	the European Anti-fraud Office (*Office européen de lutte antifraude*), charged by EU to protect its financial interests, established 1999
PFIA	the Bulgarian Public Financial Inspection Agency (*Агенция за държавна финансова инспекция*)
PPA	the Bulgarian Public Procurement Act (*Закон за обществените поръчки*), promulgated SG 28/06.4.2004, as amended
PPAgency	the Bulgarian Public Procurement Agency (*Агенция по обществени поръчки*)
Remedies Directive	Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJEU L 335/31, 11.12.2007, as amended
SAC	the Bulgarian Supreme Administrative Court (*Върховен Административен Съд*)

SektVO	the German Ordinance on the Award of Public Contracts by Utilities (*Verordnung über die Vergabe von Aufträgen im Bereich des Verkehrs, der Trinkwasserversorgung und der Energieversorgung*), promulgated BGBl. I S. 3110 / 23.9.2009, as amended.
SGB	the Austrian Criminal Code (*Strafgesetzbuch*), promulgated 13.11.1998, BGBl. I S. 3322, as amended
SME	Small and Medium Enterprises
Solution Model	the Solution Model in the Area of Public Procurement, launched on 21.2.2012 by CPCCOC
StGB	the German Criminal Code (*Strafgesetzbuch*), promulgated Federal Gazette I, p. 945, p. 3322/13.11.1998, as amended
TEU	the Treaty on European Union, signed in Maastricht in 1992
TFEU	the Treaty on the Functioning of the European Union, consolidated version OJEU C326/47, 30.10.2012
TI	Transparency International, founded in 1993 as a non-governmental organisation that monitors and publicizes corporate and political corruption in international development
TIBG	the Bulgarian branch of Transparency International (*Прозрачност без Граници България*), founded in 1998
TUAC to OECD	the Trade Union Advisory Committee to the OECD

UNCAC	the United Nations Convention Against Corruption, signed 9.12.2003 in Merida, New York
UNODC	the United Nations Office on Drugs and Crime, founded in 1997
VgV	the German Ordinance on the Award of Public Contracts (*Vergabeverordnung*), promulgated BGBl. I S. 321 / 22.02.1994, as amended
VOB/A	the German Procurement Regulation for Public Works (*Vergabe– und Vertragsordnung für Bauleistungen*), promulgated 20.9.2009, BAnz. 196a / 29.12.1997, as amended
VOF	the German Procurement Regulations for the Award of Independent Contractor Services (*Verdingungsordnung für freiberufliche Leistungen*), promulgated 12.05.1997, BAnz. 164a / 03.09.1997, as amended
VOL/A	the German Procurement Regulation for Public Supplies and Services (*Vergabe– und Vertragsordnung für Leistungen*), promulgated 31.7.2009, BAnz. 155a / 15.11.2009, as amended
WIN	Whistleblowing International Network
WKStA	the Austrian Public Prosecutor's Office for White-Collar Crime and Corruption (*Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption*)

WTO	the World Trade Organisation, formed on 1.1.1995 under the Marrakech Agreement, the successor to the GATT.

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Case C-532/06 *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v. Dimos Alexandroupolis and Others*. [2008] E.C.R. I-251.

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INTRODUCTION

This study is dedicated to the inseverable link between transparency and corruption in public procurement. It makes a theoretical attempt to justify the conclusion that application of transparency as a main principle in public procurement legislation is not and could not be the panacea against corruptive incentives in the sector. The study focuses on the Bulgarian award system as an example of a legislative framework abundant in publicity and transparency rules which, at the same time, is unable to fight corruption in the sector. The analysis examines Bulgarian public procurement legislation by investigating, one at a time, existing transparency rules, public procurement participants, and typical schemes and manifestations of corruption, which, in their largest part, remain undetected by control authorities. The last chapters are dedicated to a comparative analysis between Bulgaria and two other Member States (Germany and Austria) whose good practices could be a relevant example and could possibly be implemented in Bulgaria.

The research is of importance for developments in the regulation of public procurement towards clearer and simpler procedural rules and towards meaningful anti-corruption measures. It exposes the main weaknesses in a legislative system which, over the last decade, has undergone monthly amendments and supplements, but has not yet succeeded in limiting corruption and the resulting considerable loss of public funds. The goal of the work is to 'debunk', although not in all of its aspects, the unconditional policy of the transparency principle as the key factor in the fight against corrupt contracting authorities and pre-allocation of public contracts. Although this policy is dictated by Europe, in Bulgaria the attempts to overcome criticism against widespread corruption in public contracts are manifested solely through legislative changes ensuring monitoring and publicity of procedures, but not through efficient imperative rules aiming to enhance the competence of control bodies and/or strengthen the sanctioning mechanism against corruption.

The most common infringements at the different contract award and implementation phases are analysed in detail, making use of the following

methodology: (i) description of infringed national and EU provisions; (ii) description of the infringement itself; (iii) violation of transparency rules, if any; and (iv) types of corruption loopholes opened. Structured in this manner, the study method proves that in most cases manifestations of corruption and infringements (especially those related to 'grand' corruption) do not depend on the level of publicity of the process and often do not even violate transparency rules.

The functions of control and appellate authorities are also examined and their ineffectiveness is clearly revealed, along with their lack of awareness of the actual activities carried out by process participants, as they tend to monitor mainly the lawful implementation of the award process and the observation of procedural requirements.

The activities of the main institutions in Bulgaria engaged in the fight against corruption are also reviewed and the end-results of their studies and projects are taken into consideration. This analysis also highlights the conclusion that projects which rely on publicity and monitoring are not successful in dealing with the corrupt environment in which public procurement in Bulgaria takes place.

By way of background, a brief historical review of Bulgarian legislation in the field of corruption and public procurement is given. This serves both to illustrate the trend towards a constant increase in transparency rules and to highlight the individual social and economic specifics of corruption in Bulgaria. A proper understanding of the 'national identification' of corruption in a given country and its origins is extremely important if the most common manifestations of corruption are to be identified, as well as the method of dealing with corruption and limiting its manifestation to a minimum. In this light, a number of the conclusions drawn in this study may be viewed as general conclusions regarding the methods for preventing corruption in procurement, but others need to be considered through the prism of national characteristics and the specific case.

On the basis of the analyses made, the author reveals the absence of objective correlation between transparency, 'stretched out' beyond recognition by Bulgarian legislation, and corruption. The burdensome award system is also discussed, the complexity and inflexibility of which is due precisely (although not solely) to the excessive number of rules

requiring that data and information be provided at each step of the process, and to the unreliable attempts at creating anti-corruption rules.

The comparative analysis of the manner in which procurement award is implemented in the other two Member States and their anti-corruption policies aims to reveal that the legislation of those countries does not focus on cumbersome imperative rules making public procurements public knowledge and does not rely so heavily on transparency in the fight against corruption. Although all three of the countries examined are EU Member States and thus base their legislation on European directives, they have set the balance between the amount of transparency rules and the quality of prevention of corruption in an entirely different manner. This is why the comparative analysis is extremely important in order to outline those good practices which could be employed not only to the advantage of Bulgaria, but from which other countries engaged in the fight against the 'purchase of procurements' could also benefit.

Various criteria have determined the selection of the countries with which the Bulgarian legislative solution in the field of public procurement could be compared. The goal was to select those whose good practices could actually be implemented in Bulgaria and which do not appear outlandish or impossible to apply in the Bulgarian legal system, or diametrically opposite to the economic and social situation of the country. The countries have been examined with view of the following characteristics: (i) corruption levels, (ii) efficiency of the procurement system, and (iii) historical, substantive and economic similarities with Bulgaria. Precisely from this point of view, Germany and Austria turned out to be a good choice for benchmarking, given that a good proportion between the above criteria was established, along with proximity of legislative systems and existing economic relations between the three countries.

Germany and Austria are examined on the basis of the main legislative rules regulating public procurement and the existing transparency rules applicable to procurement awards. The main legislative and institutional solutions in the fight against corruption are reviewed. Positive solutions which could be adopted by Bulgaria have been identified, as well as such solutions which provide good results in

Germany and/or Austria but cannot be regarded as suitable for the Bulgarian system.

The comparative analysis also serves to provide recommendations as to the direction in which the public procurement award system in Bulgaria needs to change. Conclusions are drawn regarding the necessity of considerable simplification of procedures where, in place of 'non-functioning' transparency rules there should be rules which regulate the process in a much clearer manner, without leaving loopholes for selection of pre-approved candidates with impunity.

The research includes the existing legal framework of the three countries but also comments on the New Procurement Directives adopted in 2014 (Directives 2014/24/EU and 2014/25/EU). Although these have not yet been transposed in the countries discussed here and there is, as yet, no significant practice in their application in Europe (from the point of view of anti-corruption measures), the texts allow certain conclusions to be drawn from the point of view of existing practice in the sector and an estimate to be made regarding the extent to which these rules would affect the anti-corruption policies of the examined Member States.

The study constitutes a broad-spectrum analysis of three different legislative solutions regulating public procurement which focus (each employing its own means) on the fight against and the prevention of corruption in the selection of contractors. The parallel drawn between Bulgarian rules and those employed by the other two countries provides findings which could contribute both to the combat against corruption at national level and to the creation of more appropriate and effective anti-corruption measures at EU level. For this reason the contribution of the study is relevant not only to the particular legal system reviewed in detail and the 'private case of Bulgaria' but also to other countries in which public spending is systematically threatened by corruption.

Chapter 1

TRANSPARENCY – ORIGIN. THE BULGARIAN APPROACH

‘Cellophane, Mister Cellophane
Should have been my name
Mister Cellophane
‘Cause you can look right through me
Walk right by me
And never know I’m there!’

Fred Ebb ‘Mister Cellophane’, ‘Chicago’ musical

In times of definite distrust in government policies, frequent market instability and increasing corruption, in the late 1990’s society appeared to have found the panacea against virtually every sin of our present – the principle of transparency. In each country and at each institutional level transparency is on the alert for irregularities. What exactly this principle entails, what its actual content is, how it is to be applied and whether it is indeed the best instrument in the fight against corruption are questions which cannot be answered with any level of certainty.

The connection between the transparency principle and the award of public procurements contracts is the theme of the present study, which seeks to compare and pinpoint the different manifestations and different application of this principle in a number of EU Member States (specifically by comparing the Bulgarian model to that of Germany and Austria). That is why the essence of the transparency principle, its

'history', basic elements, as well as the objectives it aims to achieve in different spheres of life are structured and summarized at the beginning of this work. The focus of this chapter is on transparency as one of the main public procurement principles. European, and in particular Bulgarian legislation, is reviewed in the light of the transparency models proposed. Finally, this chapter outlines the current transparency rules contained in Bulgarian legal norms regulating public procurement and draws the conclusion that encoded transparency rules and obligations increase directly in proportion to increasing levels of corruption.

1. TRANSPARENCY – ORIGIN AND DEFINITION

The dynamic integration processes between states increase the potential risk of a nation's course of action in politics or economics negatively affecting other nations and international organisations. On the other hand, these processes enable successful government practices to serve as an example to others. Thus the experience of one nation becomes valuable for another. At some point (*i.e.*, the last decade of the 20th century, as the period in which society awoke to the concept of transparency), countries started to unmask governments and to require publicity and openness at all levels of institutional activities.

As the curtains hiding corruption, money laundering, non-competition, discrimination and all other ailments of the global community began slowly to open, society matured to respect information and to protect the right to receive such information. The simple desire to be socially informed started to transform itself into encoded rules and obligations aimed at ensuring availability and accessibility of proper information as well as supervision and exposure of the actions of the authorities at international, national and regional level. The instrument of these rules and obligations was called 'transparency' or in other words the opportunity to render the course of policy adopted by governments transparent and see-through.

Slowly but surely 'transparency […] has taken on a life of its own'.[1] It crystallises in international law as one of the recognisable and general principles of a democratic, legitimate and social state. The principle creates different obligations for governments and government institutions to ensure publicity of their actions. Transparency is associated more often with a reliable instrument: 'Greater transparency reduces uncertainty'[2] and 'decentralizes global power by breaking governments' monopoly over information and by empowering Nongovernmental Organisations (NGO's) and citizens'.[3]

The growing significance of the transparency principle is manifested in international economic law, commercial relations between state institutions and private entrepreneurs, anti-bribery policies, preservation of the environment, the struggle of nations against terrorism and many different areas of life. In Europe, the European Union (the EU) started to prescribe different practices and requirements in numerous areas in order to guarantee proper levels of transparency and information, as well as the diligent implementation of government procedures and regulatory regimes. National legislation is free to require a greater degree of transparency and to prescribe supervisory powers to different authorities, wherever member States consider it effective and in conformity with the specificities of the relevant legal regime.

1.1. DEFINITIONS OF TRANSPARENCY – SOME EXAMPLES

Despite the 'trend towards greater transparency'[4] and the significance and applicability of the transparency principle, which is widely discussed and questioned in academic literature, there is, as yet, no common definition of the term. The 'fancier' and 'more fashionable' transparency has become, the vaguer and more diluted its definition.

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1 Oliver, R. (2004). *What is transparency?*. New York: the McGraw-Hill., p. ix.

2 Lord, K. (2006). *The perils and promise of global transparency*. Albany: State University of New York Press, p. 2.

3 *Ibid.*

4 *Ibid*.

While the discussion which follows does not attempt to cover all variations of the concept of transparency or definitions of transparency, or even to determine which is the most appropriate, several completely distinct approaches are examined looking at the different points of view. The discussion proposes a summary of all elements of transparency, which, hopefully, describe this universal principal in the most comprehensive way.

In order to introduce a common, practical and not strictly legal definition of the transparency principle (or, more accurately, an explanation of its essence) a good starting point would be to focus on some simple propositions from Oliver's book '*What is transparency?*'.[5] Authors like Oliver attempt to cover the more functional aspects of transparency by claiming that this principle 'is taking on a whole new meaning: 'active disclosure''. His explanation of the increasing role of transparency in our century is that it serves the most cherished right of the (international) public – to know, to be aware of facts and circumstances which influence those facts. Oliver's view about the new 'watchword', as he qualifies transparency, focuses on these elements of the principle which regard access to information as the right of the society to actively receive understandable, complete and reliable information in every aspect of life and thus to defend its (legal) rights and interests.[6] Oliver's methodology, although suffering lack of specificity, could be accepted as a simplified and general explanation of transparency - and could be used to assist in reaching a definition of the principle in a legal perspective.

An example of a more theoretical and sophisticated attitude, defining transparency as a legal instrument, and not generally as a right of the public (as in Oliver's approach) is presented by Chayes and Chayes.[7] Although starting from a brief and concrete meaning of the term by simply defining it as 'the availability of and access to information', in the course

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5 See *supra* note 1.

6 Oliver commented that 'being transparent is 'table stake' for politicians around the world […]. Government transparency extends from the local town council to the federal government in each action' (*ibid*).

7 Chayes, A. and Chayes, A. (1995). *The new sovereignty*. Cambridge, Mass.: Harvard University Press, p. 135.

of their description they further supplement this definition by identifying transparency as

> 'The availability and accessibility of knowledge and information about: (1) the meaning of norms, rules, and procedures established by the treaty and practice of the regime, and (2) the policies and activities of parties to the treaty and of any central organs of the regime as to matters of relevant to treaty compliance and regime efficacy'.[8]

Chayes and Chayes's analysis identifies three main operations of transparency:

(i) facilitates coordination converging on the treaty norm;

(ii) provides reassurance to actors (whose compliance with the norms is contingent on similar actions) that they are not being taken advantage of and

(iii) exercises deterrence against 'actors contemplating noncompliance'.[9]

This definition offers one academic approach by describing transparency as an informational tool for observance of deviations among 'regime participants', where transparency could and should be used in order to penalize participants in such deviations. Further, the perception of Chayes and Chayes leans on the 'self-reporting of parties, subject to evaluation'.[10] [11]

Last but not least, in order to clarify the term 'transparency', dictionary definitions are also useful to facilitate comprehension of its

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[8] *Ibid.*

[9] *Ibid.*

[10] Chayes, A. and Chayes, A. (1994). *Regime Architecture: Elements and Principals* in *Global Engagement: Cooperation and Security in the 21st Century*, ed. Nolan, J.E., Washington DC: Brookings Institution, pp. 66-67.

[11] Although quite comprehensive, the definition of Chayes and Chayes and the analysis of the transparency principle gives rise to certain conclusions of the authors which could not be completely shared. The idea that transparency is an instrument which enhances compliance with treaty norms by imposing on participants the (passive) obligations to report and to inform about a particular regime and its practices is only the best case scenario in which access to and the availability of information leads necessarily to the positive effect of obedience to the regime.

main characteristics and how it is generally perceived. Two useful descriptions of transparency are:

> 'Minimum degree of disclosure to which agreements, dealings, practices, and transactions are open to all for verification'.[12]

and

> 'Essential condition for a free and open exchange whereby the rules and reasons behind regulatory measures are fair and clear to all participants'.[13]

The spotlight in these definitions is different from the one presented above and is not on the quantity of and/or accessibility of available information, but rather on the possibility for verification and on the regulatory measures. However, these are other significant features of transparency which also clarify why this principle is considered to be so valuable for society and how it is used to defend people's rights; they are also obviously the most recognisable for observers.

By way of conclusion, the main characteristics of transparency, detected in the different approaches towards definition of the principle can be conveniently summarized as follows:

A concept, used in national and international legal systems to ensure the public's right to availability and accessibility of a certain level of information about (institutional) norms, rules, procedures and regimes and the actions of participants, where the information provided should be presented in an understandable and clear manner and should always be sufficient to facilitate monitoring, verification and assessment.

[12] BusinessDictionary.com, (2015). *What is transparency? Definition and meaning*. [online] Available at: http://www.businessdictionary.com/definition/transparency.html [Accessed 18.05.2015].

[13] *Ibid*.

2. A MORE NARROW VIEW OF 'TRANSPARENCY' AS A PRINCIPLE OF GOVERNMENT PROCUREMENT

The 'public's right to know'[14] can also be a successful response to the needs for fair and less corrupt disbursement of public funds, while the transparency principle underlies procurement legislation as a fundamental and irrevocable principle. In the field of public procurement, transparency is mainly related to the concept of ensuring openness and publicity at each phase of the procedure/s, whereby participants and supervisory authorities are able to observe the process and be convinced that the contract has been awarded and be satisfied (or not) that the procedure has been handled in a legitimate and fair manner.

In public procurement legislation transparency is a *conditio sine qua non* for the award of contracts, as are the principles of free and fair competition and non-discrimination. Furthermore, transparency is often described as enabling and guaranteeing these two other principles. However, some authors still argue about the 'prominent place'[15] of transparency in public procurement and claim that this 'gives rise for concern not only because of its questionable foundation but also because it may lead to unexpected and certainly unwanted results and deprive the [European Union] procurement regime of the legal certainty it requires'.[16]

However, the EU (secondary) legislation demands contracting authorities and/or bidders to comply with obligatory requirements and restrictions at each stage of the procurement process or the implementation of a public procurement award. Member States' national legislations supplement these rules and create their own regimes whereby a proper level of transparency in public procurement is ensured.

In a very broad sense transparency in public procurement could be viewed as the obligation to ensure publicity at each phase of the procurement process and to allow supervision at each phase of the

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[14] See *supra* note 1.

[15] Trepte, P. (2007). *Public procurement in the EU*. Oxford: Oxford University Press, p. 16.

[16] *Ibid.*

procurement. It further involves the obligation to maintain fair competition between all participating candidates, as well as the obligation to ensure that potential candidates are not discouraged by unlawful requirements. Still, there is not much theoretical consensus on what transparency in procurement actually means in practice, as a consequence of the lack of a unanimous definition of the global term 'transparency', as discussed above.

In general, authors define the transparency principle in government procurement by using two separate approaches: (i) strictly describing its main purposes to ensure non-discriminatory and open treatment in the proceedings,[17] or (ii) describing the obligations which should be imposed on participants in the proceedings to ensure a proper level of transparency.[18]

The arguable meaning of transparency reflects the volume and the *onus* of the obligations imposed on the parties involved in procurement, which vary considerably across national legal frameworks. This uncertainty creates also a 'fundamental obstacle to progress on [the] questions' towards multilateral agreements on transparency in government procurement and the reasonable need for such agreements, as Arrowsmith has observed.[19] Last but not least, as a consequence of these different approaches to defining the essence and applicability of transparency, the principle of publicity and information openness also leads to different (positive, neutral or even negative) results in its main purpose to combat corruption and its implications, as will be analysed in the subsequent chapters of this work.

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[17] See *e.g.*, Schooner, S. (2002). Desiderata: Objectives for a System of Government Contract Law. *Public Procurement Law Review*, 11; Krivachka, M., Markov, M., Dimova, E. and Lilyan, Z. (2008). *The new aspects in the Public Procurement Act*. Sofia: IK Trud i Pravo, p. 33.

[18] See *e.g.*, Arrowsmith, S. (2005). *The law of public and utilities procurement*. London: Sweet & Maxwell; Trepte, P. (2007). *Public procurement in the EU*. Oxford: Oxford University Press.

[19] See Arrowsmith, S. (2003). Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the WTO. *Journal of World Trade*, 37, p. 283 and Arrowsmith, S. (1998). *Towards a multilateral agreement on transparency in government procurement*, pp. 793-816.

3. THE WORK OF INTERNATIONAL ORGANISATIONS[20] TOWARDS TRANSPARENCY IN PUBLIC PROCUREMENT PROCEDURES

In the light of the growing importance of transparency as a successful weapon against corruption in public procurements some international organisations define the offering of guidance as to this principle and research into good practices for the use of transparency in governmental policy as their priority. The role of the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD) and Transparency International (TI) are of particular importance in this respect.[21]

WTO

The WTO started operation in 1995 as the successor of the General Agreement on Tariffs and Trade (GATT).[22] The WTO is an international organisation created to act as a supervisor of international trade and its work is directed towards regulating trade between different countries and providing framework trade agreements.

One of the major achievements of WTO in public procurement regulation is the Agreement on Government Procurement (GPA).[23] The GPA covers matters such as works, supplies and other services contracts, the applicable principles to be observed, dispute resolutions. It also sets out sample transparency obligations provisions. Although the GPA remains an optional agreement for WTO members and could not become

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[20] Not exhaustively enumerated and reviewed.

[21] The EU and the United Nations have also developed specific anti-corruption policies and endorse transparency programmes and instruments as the fundamental instrument against corruption. See also the 2011 Uncitral Model Law on Public Procurement, Uncitral.org (2011).

[online] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html [Accessed 30.6.2015].

[22] An international organisation established in 1947.

[23] The *Agreement on Government Procurement* entered into force 1981 and was renegotiated in 1994 (entered into force 1996). A new revision of the GPA was made in 2012, effective as of 6.4.2014.

an obligatory measure, it is a positive step towards concretisation of a regulatory scheme at international level in procurement.

After the good example of the GPA another creative initiative of the WTO was the unsuccessful attempt to establish a multilateral agreement of transparency in procurement. In 1996 the Singapore Ministerial Conference set up a WTO Working Group on Transparency in Public Procurement to 'conduct a study on transparency'[24] in different countries' government procurement by reviewing national policies. At the Doha WTO Ministerial Conference, held in November 2001, the need for a multilateral agreement on transparency in government procurement was broadly discussed. The delegates agreed to negotiate further[25] and decided that the 'negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers'.[26]

However, the lack of clarity about the main purposes of transparency and its regulation and the different points of view of the delegates resulted in a decision on the destiny of the transparency agreement as late as 2004. The WTO General Council adopted a decision,[27] which, among other things, determined that the issue of transparency in government procurement 'will not form part of the Doha Work Programme and therefore no work towards negotiations [...] will take place within the WTO during the Doha Round'.[28] This decision discontinued the activity of the Working Group on Transparency in Government Procurement.

OECD

The OECD is an international economic organisation established in

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[24] WTO (1996). *Ministerial Declaration*. Ministerial Conference First Session, 13.12.1996 (WT/MIN/(96)/DEC).

[25] The agreement of the delegates was for the negotiations to take place at the Fifth Ministerial Conference in Cancun, 2003. However, no such negotiations were launched on this Conference and the agenda was referred to the General Council of the WTO.

[26] *Doha Ministerial Declaration*, adopted 14.11.2001.

[27] WTO Doha Work Programme (2004). *Decision Adopted by the General Council on 1 August 2004*, WT/L/579, 2.8.2004.

[28] *Ibid.*

1961 and dedicated to improving democracy, identifying good practices, coordinating domestic and international policies in economic, environmental and social issues. The risk of corruption and the lack of transparency in public procurement is an issue largely covered by the activities of OECD. In 1997 OECD members and associated non-members signed the 'Convention on Combating Bribery of Foreign Public Officials', known as the Anti-Bribery Convention. One of the main recommendations in that text is that member countries should work on increasing the transparency level in public procurement. The OECD Working Group on Bribery undertakes various kinds of activities and publications to promote transparency and accountability. The elements of the transparency principle, which will ensure integrity in public procurement, were described by OECD as:

> 'Ensuring a sufficient degree of transparency to promote fair and equitable treatment in the whole procurement cycle (*e.g.*, record management, e-procurement);
>
> Shedding light on non-competitive procurement to enhance integrity (*e.g.*, specific reporting, rotation, random audits)'.[29]

As another endorsement, the OECD Revised Recommendation on Combating Bribery in International Business Transactions[30] pledges to support the WTO in their efforts for promoting transparency in public procurements.

Transparency International

Transparency International (TI) is an international non-governmental organisation founded in 1993. It describes itself as a 'global civil society organisation leading the fight against corruption'.[31] Its network consists of more than 90 locally established national agencies. The main activity of

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[29] *Integrity and transparency in public procurement – from good practice to the OECD Checklist*. (2007), OECD/DAC Joint Venture on Procurement, Copenhagen, p. 6 presentation.

[30] *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*. (1997). OECD, adopted by the Council at its 901st session on 23.5.1997 [C/M(97)12/PROV]), p. 4.

[31] *Transparency International - The Global Anti-Corruption Coalition*. [online] Transparency.org. Available at: https://www.transparency.org/ [Accessed 18.5.2015].

this organisation is to promote transparency at each level of political and economic behaviour and, in particular, in public procurement. TI approaches other organisations, including OECD, and encourages joint activities and employs governmental lobbying to apply anti-corruption measures and increase transparency in the international legal framework. In this respect TI is often shown as the great supporter and promoter of the OECD Anti-Bribery Convention. TI's policy is to investigate manifestations of corruption on multiple aspects and to patronise studies, researches and reports about corruption.

Currently, the most well-known of TI's activities is the implementation of the annual Corruption Perceptions Index (CPI) which annually ranks all countries according to the degree of perceived corruption. CPI was developed by TI and was first published as an annual index in 1995. It illustrates (based on subjective principles) the corruption levels in more than 170 countries worldwide. The index is based on studies conducted among representatives of business circles and analysers from each country at hand. CPI puts particular focus on corruption in the public sector and defines it as 'abuse of public status for personal benefit'.[32]

Bulgaria was first included in the CPI in 1998 and was awarded a low 2.9 index value. The CPI values for Bulgaria through the years as well as the limitations of the index in comparison to other methods for establishment of the corruption level in Bulgaria are discussed in the following chapters.[33]

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[32] *Corruption Perception Index – 'Transparency International' Bulgaria*. [online] Transparency.bg. Available at: http://www.transparency.bg/en/research/corruption-perception-index/ [Accessed 18.5.2015].

[33] The work of these and other national organisations, operating at local level in Bulgaria with the purpose of establishing the best functioning mechanism for protection of transparency and combating corruption in public procurement award will be further reviewed in the next chapters of this study.

4. EU PUBLIC PROCUREMENT LEGISLATION IN SERVICE OF TRANSPARENCY. A BRIEF HISTORICAL OVERVIEW

4.1. THE TREATIES AND ECJ DECISIONS

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), collectively referred to as the Treaties,[34] do not specifically regulate any issues concerning the award of public procurement contracts, except for the normal internal market provisions.[35] The transparency principle is not explicitly regulated by the Treaties either.

However, the European Court of Justice (ECJ) deliberately changed this common perception with the *Telaustria* case[36] in 1998. The decision in this case practically imposes an additional meaning of the free movement principle of the EC Treaty in the context of public procurement, namely the obligation for transparency. According to ECJ: 'That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of the potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'.[37]

Through the *Telaustria* case the transparency principle in the public procurement regime found its origins in the provisions of the Treaties.[38]

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[34] The current consolidated version of these Treaties can be found in OJEU 2012 C 326/13 & 47 respectively.

[35] The main relevant provisions are TFEU, Art. 34-36 on the free movements of goods, TFEU, Art. 49-55 on the freedom of establishment, TFEU, Art. 55-62 on the services and TFEU, Art. 106 on the special or exclusive rights on public undertakings and entities.

[36] C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

[37] In the light of the discussion of the lack of unanimous definition of transparency, Arrowsmith, S. (2005). *The law of public and utilities procurement*. London: Sweet & Maxwell., pp. 191-199, discusses the issue whether the concept of transparency provided by the ECJ in the *Telaustria* case is indeed clear and comprehensive and whether transparency involves requirements other than advertising.

[38] Case C-87/94 *Commission v. Belgium (Walloon Buses)* [1996] ECR I-02043 is historically considered the first case setting out the principle of transparency. Further, Case C-275/98 *Unitron Scandinavia A/S* [1999] ECR I-8305 concludes that transparency should always apply, even when no tendering requirements are at hand. However, actual

This meant that the transparency obligations become applicable to all procurement procedures irrespective of their value, *i.e.*, below or above the thresholds of the public procurement directives. This general application of the principle was widely criticised by theory as creating confusion and lack of clarity in the procurement process, rendering unclear which particular obligations and rules should be complied with. Arrowsmith's view that 'the Treaty's transparency principle should be fashioned to apply only when there are no […] alternatives in place'[39] seems to be a rather better approach than the uncertainty created by the *Telaustria* case.

Further, Trepte[40] explains in details why the *Telaustria* conclusions are open to criticism, by discussing three main issues:

(a) advertising below the threshold might contradict national policies with respect to the applicability of the value for money principle (advertising could be considered not cost efficient);

(b) the idea of the imposition of thresholds for procurements of higher value, which might most likely seriously affect competition, is closely connected to the desire of the legislator that such procurements be treated more strictly and gives rise to a chain of rules which are considered unnecessary for procurements under certain value (*de minimis* are applicable);

(c) the imposition of a general transparency requirement implies that such advertising obligation would apply even to those numerous specific contracts, excluded from the scope of the applicable procurement legislation, which 'cannot be what was intended'.[41]

Following *Telaustria*, these issues have arisen in numerous subsequent cases,[42] as well as in *Coname*,[43] where, however, the scope of

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impact on the implementation of this principle in the public procurement procedures has the judgment under the *Telaustria* case.

39 Arrowsmith, S. (2005). *The law of public and utilities procurement*. London: Sweet & Maxwell, p. 197.

40 Trepte, P. (2007). *Public procurement in the EU*. Oxford: Oxford University Press, pp. 19-22.

41 *Ibid*, p. 22.

42 See Case C-59/00, *Bent Mousten Vestergaad v Spottrup Boligselkab* [2001] ECR I-9095; Case C-264/03 *Commission v France* [2005], ECR I-8831; Case C-458/03 *Parking Brixen GmbH v Gemainde Brixen, Stadtwerke*

application of the common Treaty rules and in particular the transparency rule was limited to contracts which are of interest to bidders from other Member States (even if below the thresholds).

Finally, in 2007, Advocate General Sharpston clarified to the greatest extent the uncertainty regarding application of the transparency rules to contracts below threshold in *Commission v Finland*.[44] She adopted a much more liberal approach to below-threshold contracts, concluding that the degree of publicity for low value contracts should be determined by national law (meaning that the general rules of the Treaties could not sufficiently apply to such contracts).[45] She opined that the imposition of detailed publicity requirements for these contracts would lead to legal uncertainty.

As will be seen in this study, it is not always the case that where European legislation or ECJ decisions provide Member States with greater freedom of action in the application or regulation of a certain element of the public procurement award procedures, this freedom finds expression in a successful and practical legal rule. In many cases, *e.g.*, in Bulgaria, the legislator tends to 'play it safe' and attempts to secure its work against possible criticism by the EU and so, despite the availability of the option for a lighter regime, chooses to regulate procedures in such a way as to make them far more complicated and difficult to apply than necessary. In this specific case, however, it is possible to draw the general conclusion that the opinion of Advocate General Sharpston in *Commission v. Finland* puts a stop, at the very least, to the issue of the endlessly widened application of the general Treaty rules[46] following *Telaustria* and subsequent cases, and the uncertainty as to how and to what extent the below-threshold contracts should be advertised and publicized.[47]

Brixen AG [2005], ECR I-8612 – these cases reiterate to a large extent the conclusions of *Telaustria* and once again the applicability of the general rules of the Treaties to below threshold contracts.

43 Case C-231/03 *Consorzio Aziednde Metano ('Coname') v. Padania Acque SpA* [2005] ECR I-7287.

44 Case C-195/04, *Commission v Finland* [2007] ECR I-3351, 3353.

45 See par. [79] to [98] of the Opinion of Advocate General Sharpston.

46 See also par. [27] to [32] of the judgment under *Commission v. Finland*.

47 See also McGowan, D. (2007). Clarity at Last? Low value Contracts and the Transparency Obligations. *Public Procurement Law Review*, 4, pp. 274-283.; Kotsonis, T. (2007). The Extent of the Transparency Obligation Imposed

4.2. THE DIRECTIVES

Council Directive 71/304/EEC and Council Directive 71/305/EEC[48] were the first European measures which introduced the basic principles of public procurement conduct – non-discrimination, equal treatment and transparency. However, the original texts of these Directives[49] do not mention the term 'transparency' explicitly but rather imply the necessity of such a rule and some of its elements.

Further, the four directives[50] which regulated public procurement procedures before the currently applicable EU public procurement legislation (as defined below) were also concise as to matters of explicit transparency rulings. By way of exception, Council Directive 93/38/EEC[51] discusses in its preamble the need to ensure a 'minimum level of transparency […] for monitoring the application of this Directive'.

However, based on the requirements and restrictions of these four directives, Arrowsmith[52] determines quite comprehensively the four basic aspects of the transparency principle in government procurement and the

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on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, 26.4.2007. *Public Procurement Law Review*, 5, pp. NA119-NA122.

48 Council Directive 71/304/EEC of 26.7.1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJEU L 185, 16.8.1971 and Council Directive 71/305/EEC of 26.7.1971 concerning the coordination of procedures for the award of public works contracts, OJEU L 185/5 of 16.8.1971.

49 The preamble of Directive 89/440/EEC, OJEU No L 210, 21.7.1989, which amends Directive 71/305/EEC discusses the need for increased transparency in the procedures for improved monitoring of compliance with the prohibition of restrictions of the Treaties freedom of establishment and freedom to provide services.

50 *i.e.*, Council Directive 92/50/EEC relating to the coordinating of procedures for the award of public work contracts, OJEU L 209/1 of 24.7.1992; Council Directive 93/36/EEC, co-ordinating procedures for the award of public supply contracts, OJEU L 199, 9.8.1993; Council Directive 93/37/EEC concerning the co-ordination of procedures for the award of public works contracts, OJEU L 199, 9.8.1993 and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJEU L 199, 9.8.1993.

51 Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJEU L 199, 09.08.1993.

52 Arrowsmith, S. (2005). *The law of public and utilities procurement.* London: Sweet & Maxwell., pp. 127-128 and Arrowsmith, S. (2014). *The law of public and utilities procurement. Vol. 1*. London: Sweet & Maxwell., p. 155 and pp. 164-166.

corresponding obligations of the parties involved in procurement, which reflect these elements. She distinguishes six explicit transparency rules, which require that entities:

‘ 1. advertise contracts Europe-wide through the European Commission,

2. hold a competition between interested firms. Entities may dispense with an advertisement and competition only in exceptional and specific cases, such as extreme urgency.

3. exclude firms from the competition only for justified reasons specified in the directives, mainly concerned with the firm’s lack of financial or technical capacity.

4. respect minimum time-limits for important phases of the procedure, to ensure that all firms have time to participate.

5. award the contract based on the results of the competition, on the basis of criteria specified in the directives and notified in advance.

6. provide information on decisions to interested parties, including tenderers.’

The four aspects of transparency which Arrowsmith sees as directly linked to these obligations are:

(a) publicity for all contract opportunities;

(b) publicity for the rules governing each procedure;

(c) limitation of discretion, particularly relevant to preventing concealed discrimination and

(d) opportunities for verification and enforcement.[53]

The first EU procurement legislative measures that explicitly set out rules and specific provisions as to how transparency should be ensured in

[53] Although Arrowsmith indeed provides the most detailed explanation of the principle of transparency, covering all possible features and characteristics, the author of this work remains unsure whether transparency in procurement must be so overloaded with meaning.

the conduct of any public procurement procedure are Directive 2004/17/EC and Directive 2004/18/EC[54] (collectively referred to as the Procurement Directives). While these Procurement Directives and their replacements adopted in 2014[55] will be discussed as appropriate in this work, it is worthwhile to also note at this stage that none of these directives contains a definition of the term 'transparency'. Although the new procurement package, expected to be transposed in all Member States by April 2016, contributes to the expansion of transparency to some extent (*e.g.*, by promoting e-procurement), the focus of the changes is elsewhere: facilitating procedures, supporting small and medium enterprises, fighting corruption and regulating social and economic goals in procurement.

The mechanism of all European directives in the field of public procurement, past, present, and new, shows that the European legislator has rejected the method of full harmonisation of all procedures for the award of public procurement; the idea of 'general harmonisation' was perceived as sufficient. Thus, individual Member States have preserved some differences in their legislative schemes, which affect transparency rules as well. For this reason, the present study will investigate not only how the Bulgarian legislator 'interprets' transparency in public procurement but will also perform a comparative analysis with two other continental legal systems similar to the Bulgarian one (Germany and Austria), which provide completely different approaches to and interpretation of the concept of transparency.

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[54] European Parliament and Council Directive 2004/17/EC on procurement procedures of entities in the water, energy, transport and postal services sectors and European Parliament, OJEU L 134, 30.4.2004 and Council Directive 2004/18/EC on procedures in public works contracts, public supply contracts and public service contracts, OJEU L 134, 30.4.2004.

[55] Directive 2014/24/EU of the European Parliament and of the Council of 26.2.2014 on Public Procurement and repealing Directive 2004/18/EC, OJEU L 94, 28.3.2014 and Directive 2014/25/EU of the European Parliament and of the Council of 26.2.2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and repealing Directive 2004/17/EC, OJEU L 94, 28.3.2014 (both directives to be transposed up to 18.4.2016).

5. DOES BULGARIAN LEGAL THEORY UNDERSTAND TRANSPARENCY AND HOW?

PROGRESS AND DEGRADATION OF THE PRINCIPLE IN BULGARIAN PUBLIC PROCUREMENT LEGISLATION

5.1. HISTORICAL PREDISPOSITION

Bulgarian legislation and Bulgarian legal theory engage with the principle of transparency in public procurement with the typical attitude of a post-communist country attempting to become a reliable EU Member State. At the beginning of its harmonisation process as an associated EU partner (after February 1995)[56] Bulgaria recognised the need to increase transparency rules in its legislation as the 'inevitable evil' which would somehow persuade EU that the fight against corruption on a domestic level has unequivocally commenced. However, no reliable sanctions were proposed for the participants in a particular regime for infringing the obligations of transparency.[57]

However, after a series of EU Commission reports criticizing the high level of corruption and discrimination in the country and strongly recommending legislative changes to ensure transparency at different institutional levels and in particular in public procurement procedures, Bulgarian members of Parliament began to realize the unavoidable need for fundamental changes in the legal system's *status quo*.

Karadjova[58] describes the Bulgarian attitude towards European legislation regulating public procurements and the new principles, which Bulgaria has to consider, in a very perceptive manner:

'The relations between the administration and private

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[56] 1.2.1995 the European Community Association Treaty comes into effect for Bulgaria.

[57] As a consequence from the above, the Bulgarian legal theory does not offer any particular researches or studies explaining and analysing the principle of transparency.

[58] Karadjova, M. (2008). Legal mechanisms for decreasing the conflict of interest through the award of public procurements. *New Bulgarian University*, vol. 3 (Year Book III). Available at: http://www.nbu.bg/PUBLIC/IMAGES/File/CPA/Godishnik_2008/MilenaKaradjova.pdf [Accessed 18.5.2015].

> businesses were established for the sake of West-European countries. This leads to the implementation of a commonly accepted borderline of tolerance cutting across the area of interference between public and private, reflected in the legislative acts, as well as in unwritten, but time-proven, commonly observed ethical norms. This is probably one of the reasons for the relatively easy establishment of common regulations for public procurements by EEC founders. As part of the European market since 2007, Bulgaria is obliged not only to accept, but also to adequately apply this legislation. It is a huge challenge that it needs to apply not only Community directives, but also its ethical standards. Because of a number of historical, social and national psychology factors this turns out to be difficult to achieve'.

The challenging change expected to take place in Bulgarian mentality as well as the respect owed to European principles on a domestic level, began to have their effect, initially, on academic theory, where some Bulgarian authors described the principle of 'publicity and transparency' (as it is known in Bulgarian legislation) as 'an important guarantee for the legal assignment, the functioning of the rest of the principles, as well as for the performing of public control over the procedures'.[59]

However, the meaning of the transparency principle is neither clarified in current legislation in Bulgaria, nor studied in theory, with the simple exception that transparency is defined as a principle of public procurement in the current public procurement legislation.

Pressed by the EU and the reports of the EU Commission (before and after the accession of Bulgaria to the EU) the Bulgarian legislator initiated a series of amendments and supplements to the existing legislative framework regulating public procurements, which demonstrate, one after the other, a huge level of inconsistency in drafting and no reflection in practice.

In order to discuss the Bulgarian legislative approach to public procurement and to highlight the numerous negative changes which

[59] Markov, M. and Krivachka, M. (2006). *The new aspects in the Public Procurement Act*. Sofia: IK Trud i Pravo.

Bulgarian legislation has suffered, it is useful to investigate, in chronological order, the various public procurement laws, up to the current one, discussing, where appropriate, the existence or not of any transparency requirements:

The first piece of legislation in Bulgaria dealing with public procurement was drafted soon after the end of the Russia-Turkey war and the establishment of the new Bulgarian state. The Ministry of Public Buildings at that time proposed the Public Tenders Law (*Закон за публичните търгове*), which entered into force in 1882. This Act did not formulate any principles for the performance of public tenders. However, some provisions stipulate the need for specific written evidence of the moral qualities of the candidates.[60]

The first Bulgarian act which heralded what might be called a 'transparency principle' as a condition for fair and non-discriminatory procurement award was drafted in 1906 – the Public Enterprises Act (*Закон за публичните предприятия*). Transparency obligations were presented in detail. The provisions elaborated the strict order in which contracting authorities should provide particular information about forthcoming tenders so that all interested parties might be acquainted with them. Further, each tender had to be published in the State Gazette and tender announcements had to be posted in cities and villages.

Later on, in 1921 the Public Enterprises Act was amended and supplemented. The new act, called The Budget, Accountancy and Enterprises Act (*Закон за бюджета, отчетността и предприятията*), further improved public procurement regulation and was an example of high-quality, valuable legislation, which guaranteed the implementation of fair and transparent procedures. Unfortunately, the communist regime after 1945 repealed all legal acts which regulated private property and the commercial activities of private enterprises.

The era of the communist regime in Bulgaria was later defined by history itself and by various commentators as a period of flourishing

[60] *e.g.*, The Act on the Public Tenders, Art. 6, stated that 'No one could participate in the tender if he/she does not present a certificate for honesty taken from the local municipality'.

'organised and official'[61] corruption. Even the communist dictator Todor Jivkov once famously exclaimed: 'Corruption has taken a permanent place in our lives and causes heavy moral and material damages. […] [S]ometimes the interests of the state, evaluated in thousands and millions of Levas[62] and Dollars, are sacrificed just for a trivial bribe'.[63]

At that time public procurement of course no longer existed due to the fact that each property and/or service was distributed directly by the state and the government, and private property was prohibited.

As a symbol of post-communist Bulgaria, Ordinance No 2 of 1991 of the Ministry of Architecture and Construction for conducting tenders in the field of construction (*Наредба No 2 от 1991 г. на Министъра на строителството и архитектурата за провеждане на търгове в областта на строителството*) was a first but inadequate attempt at regulating procurement in the field of construction works. This piece of legislation made no attempt whatsoever to set out any of the principles of the tender procedures, although a few transparency rules and obligations can be distinguished in some of its provisions. For example, Article 13 required that each tender be announced in advance through mass media, and Article 14 set out the minimum requirements and information which a call for competition should contain. Even though this system was a start in the right direction, it was, nevertheless, a vague attempt at structuring and regulating tender procedures for construction works.

In 1995 Bulgaria entered into the Europe Agreement Establishing an Association with the European Communities and their Member States (signed 8 March 1993, in force as of 1 February 1995).[64] Article 68 of this document commented that 'The Parties consider the opening up of the award of public contracts on the basis of the principles of non-discrimination and reciprocity, in particular in the GATT context, to be a desirable objective'.

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61 Avramov, R. (2007). *The communal capitalism – among the Bulgarian economical past,* vol. III. Sofia: Center for Liberal Strategies.

62 *i.e.*, the Bulgarian currency is called Lev, internationally indicated with BGN or Lv.

63 Ivanov, M. (2008). *Reformation without reforms. Political economy of the Bulgarian communism 1963 – 1989*. Sofia: Open Society Institute and Ciela.

64 OJEU 1995 L 358/3.

As a logical continuation of the initiatives stemming from this agreement as well as of the process of further development of Bulgarian public procurement legislation, 1997 saw the adoption of the first Bulgarian Award of Procurement Contracts Act (*Закон за възлагане на държавни и общински поръчки*, APCA).[65] This was the first attempt to codify public procurement procedures. Far from being a masterpiece, it was widely criticized for being incompatible with the Procurement Directives (despite the ongoing process of harmonisation). APCA did not create any productive opportunities for promoting and enforcing transparency or any other procurement principle in practice. It did not provide a definition of transparency but it did, however, contain some provisions which appear relevant in the light of transparency requirements, such as:

(a) the call for competition should be promulgated in the State Gazette and in at least two national daily newspapers;

(b) the call for competition for major construction projects should be published at a certain period prior to the tender;

(c) the tender documentation and the conditions have to be described in detail;

(d) the criteria for candidate evaluation have to be announced in advance *etc*.

After the APCA, the first Public Procurement Act (*Закон за обществените поръчки*, the First PPA)[66] came as an attempt to harmonise domestic with European legislation. Its main goal was stated to be 'increasing the effectiveness in the use of the budget and public funds through: 1. determination of transparency […]'.[67]

The four principles of the award of public procurement contracts were explicitly set out in Article 9:

' 1. guaranteed publicity and transparency of the procedure

[65] Promulgated SG 9/3.1.1997, repealed, SG 56/22.6.1999.

[66] Promulgated SG 56/22.6.1999, repealed SG 28/2004.

[67] First PPA, Art. 2.

2. free and fair competition
3. equal opportunities for participation of all candidates
4. guaranteed protection of the commercial secrets of candidates and their offers'.

The First PPA initiated the launch of the first Bulgarian Public Procurement Register. An obligation for contracting authorities to publish all planned procurement calls of over BGN 1 mln. (approx. EUR 511,273) in State Gazette by 31 March each year was also envisaged. However, the published information had the simple purpose of attracting more candidates. Contracting authorities were still not obliged to announce the procurement procedure itself.

This First PPA could be regarded as a positive start towards harmonisation of the Bulgarian procurement legislation with the Procurement Directives. However, one of its major failings was that it did not stipulate the establishment of a centralized supervisory authority to supervise the accurate application of the law and to control and sanction contracting authorities. Thus, the first years of application of this act failed to achieve the desired clearer regulation, transparent actions on behalf of participants in the procedure and reduction in corruption.

As a consequence of the Regular Report of the EU Commission in 2003[68] and its harsh criticism of the poor state of the public procurement regime in Bulgaria, in 2004 the Bulgarian legislator decided to repeal the First PPA and to start tackling public procurement all over again with a brand new *Public Procurement Act* (*Закон за обществените поръчки*, the PPA).[69]

A positive effect of the PPA was the setting up of the Bulgarian Public Procurement Agency as a centralized controlling body specialized only in public procurements. The establishment of the Court of Arbitration by the Public Procurement Agency has been a further step towards the

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[68] The *2003 Regular Report on Bulgaria's progress towards accession the European Commission* found that: 'As to public procurement, further efforts are necessary to align with the *acquis* and to build up the necessary administrative capacity', p. 24, and concluded that Bulgaria needs to address urgently the delays incurred in aligning with EU public procurement rules.

[69] Promulgated SG 28/6.4.2004, as amended.

recognition of the transparency principle by contracting authorities as one of their ultimate obligations in the award of public procurements contracts.

In 2006 the Procurement Directives were transposed into the PPA and this gave rise to such a great number of amendments to the PPA and the whole package of applicable secondary legislation that the Act became, more or less, an entirely new piece of law. Although criticized, the amendments of 2006 were a major step towards a modern, communicable and open to the public regime.

An additional reason for the radical redrafting of the PPA in 2006 was the monitoring report of the European Commission (EU Commission) of 25 October 2005. The conclusions of the EU Commission were:

> 'Surveys and assessment conducted by both national and international organisation confirm that widespread corruption remains a cause for concern and affects many aspects of society. There is a positive downward trend as far as administrative corruption is concerned, but the overall enforcement record in the field of corruption remains very week. […] Some areas of public administration remain particularly vulnerable to corruption. This is the case for those engaged in public works contracting […]. There have been several exemptions already from the new law on public procurement […]. Claims of non-transparent procedures for procurement […] are continuing'.[70]

As a consequence, the amended PPA provided some reasonable measures on how Bulgarian procurement administration could become more effective and transparent (although the corruption levels remained quite the same). The electronic format of the Public Procurement Register was introduced and helped to increase access to the procedures and planned procurements. Another positive effect of the amendments was the alignment with the changes required by Procurement Directives and the obligation of contracting authorities to publish the call for competition at European level as well.

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[70] European Commission, Comprehensive monitoring report, 25.10.2005, *Implementation of recommendation for improvements/Anti-corruption measures*, COM (2005) 534 Final.

Between 2006 and the present, the PPA underwent more than thirty amendments and supplements, most of them dictated by the negative reports from the EU Commission commenting on the flourishing corruption and the lack of transparency in the management of public and EU funds in Bulgaria. The EU Commission evaluated the lack of transparency and accountability in the area of public procurements as a 'grave problem' and recommended that urgent action be taken so that Bulgaria could 'improve the supervision and transparency of public procurement procedures at central, regional and local level in strict conformity with the applicable EU rules'.[71]

However, despite all kinds of amendments throughout the years and the increase in the number of legislative rules which require publicity and transparency in the conduct of award procedures, Bulgarian contracting authorities continued to regard most of the amendments as obstructive to the procurement process rather than limiting corruption practices. For example, the PPA amendments of 2012 were intended to reflect the recommendations of the EU Commission, made in its annual 2012 report[72] provoked by the problems in Bulgaria related to procurement procedures. The 'award of public procurements by public call for tenders'[73] was introduced to replace the requirement for advance obtaining of three offers and to revoke the practice of awarding contracts to companies favoured and pre-selected by the contracting authority, in breach of the fundamental European principles - equal treatment, transparency and predictability of the actions of contracting authorities. The amendments, however, failed to achieve their initial goal. Practice shows that in some cases legislative rules further aggravated the situation: contracting authorities misinterpreted the new rules, and in their quest to award procurements using the public call for tenders they tended to divide the contracts into lots in violation of the law. The contracting authorities justified their actions with the ambiguity of the legal norms and thus opened the

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71 *Report from the European Commission to the European Parliament and the European Council on the Management of EU-funds in Bulgaria*, COM (2008) 496 Final.

72 *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification mechanism*, 18.7.2012.

73 Chapter 8a of PPA, as applicable from 26.2.2012 until 1.7.2014.

floodgates to much bigger administrative outrage and corruption.

Ultimately, the task of ensuring publicity and transparency and prohibiting the granting of advantages or, conversely, unreasonable restriction of participation in the procedure by potential bidders has been supplanted by the inconsistent compilation of documentation and the blatant introduction of restrictive conditions in many of the procedures. Against these actions, it appears that there is no mechanism for protection.

5.2. TRANSPARENCY AND THE LATEST AMENDMENTS OF PPA

The most recent substantial amendments to the PPA from 2014[74] and the corresponding amendments to the Regulations on the application of PPA (*Правилник за прилагане за закона за обществените поръчки*) from December 2014[75] were dictated by yet another obsession for 'ostentatious transparency' which the Bulgarian legislator decided to demonstrate, and by the desire to transpose part of the rules under Directive 2014/24/EU and Directive 2014/25/EU[76] (collectively referred to as the New Procurement Directives) into Bulgarian legislation.

These changes to the PPA were introduced at a time of severe political instability which additionally affected the adopted texts, effectively reducing PPA to a 'patchwork' of endless rules and obligations for publication and promulgation of each and every act and action of contracting authorities, without, however, protecting the interests of candidates.

Oliver's words on transparency apply in full force to the PPA in its current format: '[Transparency] has moved […] to centre stage in a drama

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[74] SG 40/13.5.2014, effective as of 1.7.2014 and 1.10.2014 respectively.

[75] Regulations on the Implementation of the Public Procurement Act, effective as of 1.7.2006, Council of Ministers' Decision 150/21.6.2006, as amended.

[76] Directive 2014/24/EU of the European Parliament and of the Council of 26.2.2014 on Public Procurement and repealing Directive 2004/18/EC, OJEU L 94, 28.3.2014 and Directive 2014/25/EU of the European Parliament and of the Council of 26.2.2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and repealing Directive 2004/17/EC, OJEU L 94, 28.3.2014 (both directives to be transposed up to 18.4.2016).

being played out […] in many forms and functions. […]. It blossomed from a simple ideal to a complex set of expectations and regulations. […] [It] spawned a growing horde of government and non-government organisations […] and created an entire legion of transparency hiders and seekers'.[77]

Redrafting award rules into a completely new act on public procurement would be the only correct approach to structuring statutes in this field and creating rules which would be both practically applicable and conducive to the effective organisation and implementation of accountable and fair procurements. This approach should be adopted by the legal commission in the Bulgarian Parliament not least because legislation in this field at European level has already been revised. In any case, if the New Procurement Directives are transposed on the current legal framework, the effect will be undeniably negative.[78]

Despite the criticism against PPA and the expectations that it will soon be replaced in its entirety, a summary of the main rules ensuring transparency in the award process under the now applicable legislation is be provided[79] below with the purpose of refining the picture illustrating the specific approach of the national legislator:

(a) The contracting authority publishes the invitation to participate on the internet portal of the Procurement Agency, in the so-called 'buyer's profile'[80] on its official webpage and sends notification to the media.

(b) Contracting authorities submit the decisions for initiation of contract award procedures, the decisions for any changes to, or termination of,

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77 See *supra* note 1, p. ix.

78 Up to the middle of 2015 some ministries and other public organisations have proposed drafts of a new procurement act, but such piece of legislation is still not commented in the Parliament.

79 The exceptions under procurements related to national defence and security are outside the scope of this analysis.

80 Introduced as an additional but non-mandatory option for ensuring procurement publicity under Directive 2004/18/EC, Art. 35 (and mirrored in Directive 2004/17/EC, as well). The New Procurement Directives (*e.g.*, Directives 2014/24/EU, Art. 48) refer to the 'buyer's profile' as well, without adding additional content to the previous regulation or making the use of it obligatory.

procedures, any notices for contracts above the relevant threshold,[81] information on awarded procurements and implemented contracts, information on the progress of procedures in the event of appeal proceedings and any other relevant information to the Public Procurements Register.[82]

(c) Where the procurement exceeds European thresholds, in addition to promulgation in the Public Procurement Register, contracting authorities must advertise in the Official Journal of the EU (OJEU) all decisions regarding the launching, change and termination of public procurement procedures as well as the notices which need to be filed with the register; information on awarded procurements and implemented contracts, information on the progress of procedures in the event of appeal proceedings[83] *etc*.

(d) When submitting acts and decisions subject to promulgation by the Public Procurement Agency, contracting bodies need to include a hyperlink to their webpage, and, in the buyer's profile on their page, to publish the relevant documents, submitted to the Public Procurement Register (and OJEU, respectively) - prior notices, decisions on the launch of procedures, the relevant participation documentation and any supplementary documents and explanations thereto and any other documents containing important information for interested parties and candidates. Several documents which so far were not subject to mandatory promulgation will now need to be advertised and uploaded on the buyer's profile, such as commission's protocols and reports on procedures, concluded public procurement contracts, subcontracting agreements and information on payments under those agreements, the date, grounds and amount of each payment under public procurement contracts and subcontracting agreements, including advance payments, if any, the date and grounds for the release, claim or retention of performance guarantees

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[81] The mechanism of awarding according to Bulgarian legislation is divided into (i) procurements below the thresholds; (ii) procurements above certain national thresholds as determined by the PPA and (iii) procurements above the EU thresholds as defined by the Procurement Directives.

[82] PPA, Art. 22.

[83] PPA, Art. 45c.

for each contract[84] *etc*., *etc*.

(e) All documents uploaded on the buyer's profile (with any sensitive information and/or commercial secret, if applicable, deleted in advance) must be retained there for a period of one year starting from the time of their promulgation or amendment, while the statements of the Executive Director of the Bulgarian Public Procurement Agency and any other documents relating to internal rules of the contracting body and participant contact information must be retained for an indefinite period of time.[85]

(f) Regulation is introduced as to the use of the e-Monitoring platform by control bodies (close to the idea of the EU legislator, as demonstrated in the New Procurement Directives). This platform provides online access to the minutes and protocols of all procedure implementation commissions, to public procurement contracts and any annexes thereto, to framework agreements and subcontracting agreements.

(g) Another platform which may be used by control bodies is the e-Audit platform (again in conformity with the new procurement package). This makes use of a communication system allowing natural persons and institutions to signal and alert for unlawful procedures in the award process and irregularities in the implementation of public contracts.

(h) Tender opening is public and may be attended by participants or authorized representatives, as well as media representatives and other individuals in observance with the access regime for the respective building in which the tender opening procedure is to take place. Given that this access regime usually involves a simple ID check, in reality the PPA admits anybody to the opening procedure.

(i) Separately from everything listed above, the PPA[86] also regulates the rules concerning voluntary transparency in compliance with the

[84] PPA, Art. 22b(1).

[85] PPA, Art. 22b(6).

[86] PPA, Art. 41c.

option provided by Article 37 of Directive 2004/18/EC.

This list is not exhaustive but even in this abbreviated format is quite sufficient to illustrate the information flow and the numerous obligations of the contracting body with view of ensuring transparency throughout the award process.[87] Of course, some of the examples above correspond to the requirements of the Procurement Directives and the New Procurement Directives,[88] but a critical observer will not fail to notice the numerous additional publication methods that supplement European requirements (as a mandatory and not an optional obligation) and the superfluous overlapping of information thus achieved.

Bearing in mind that one of the reasons for the EU to take action to replace the existing Procurement Directives with the New Procurement Directives was precisely the desire to simplify rules and procedures, the legislative decision to saddle participants with so many additional obligations obviously runs contrary to that desire. As pointed out in the EU country report for 2014: 'The amendment to the Public Procurement Act of May 2014 has further aggravated the situation, with different commencement dates for its specific parts, while a number of weaknesses in the legal framework remain unaddressed. [...] At the same time, however, many procurement procedures are subject to overlapping *ex post* control, sometimes resulting in divergent findings.'[89]

Some of the additional rules introducing obligations for the promulgation of, in essence, every single document and step in the course of the award procedure, regardless of its significance, have been in force for a relatively short period but already voices are being raised among those applying the PPA (both contracting bodies and consultants), that the

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[87] At present there is already a draft for a new PPA proposed by the Ministry of Economy. The said draft is currently at the 'public discussion' phase and is ambitiously expected to be adopted by Parliament and to enter into force at the beginning of 2016. The draft transposes the new procurement package. Its current version is still too raw and the original proposals contained do not deserve serious attention, since much of the draft has yet to be processed before being submitted to and voted by Parliament. It is worth noting, however, that it does make an attempt at reducing the volume of mandatory information to be uploaded on the 'buyer's profile'.

[88] It is not clear why the legislator has chosen to transpose some of the rules of the New Procurement Directives into the PPA so early despite being well aware that the whole package should be transposed at a single moment.

[89] *Country Report Bulgaria 2015 including an In-Depth Review on the prevention and correction of macroeconomic imbalances* (2015), Brussels SWD(2015) 22 final, p. 57.

rules verge on the excessive.

The problems are several:

(i) Against the background of all the obligations of the contracting body to submit, upload and delete sensitive data from documents, the legislator has set out relatively short time frames (between 1 and 30 days in the different cases) within which these steps are to be taken, with administrative sanctions in the event of failure to observe these frames;

(ii) In order to comply with the requirement to maintain an official website with sufficiently good characteristics and the necessary storage capacity to upload and retain hundreds of documents, a contracting authority would require financial means which are unavailable to a large portion of classic contracting bodies (e.g., small municipalities);

(iii) In order to observe the time limits and to upload the documents on the buyer's profile in the required manner, some contracting bodies will need to hire additional employees, which will once again demand financial resources which are simply not available;

(iv) Work on organisation of the procurements becomes so complicated that the focus on combating corruption through transparency is completely lost.[90]

Last but not least, there is another issue which needs to be highlighted and which grows in proportion to the increasing publicity obligations: in the current format of the Act several characteristics of the transparency principle itself have been pushed far into the background, as summarized by Arrowsmith (and discussed above). The analysis of Bulgarian legislation in terms of the manner in which the legislator has opted to ensure transparency in the award process shows that the letter of the law focuses mainly on publicity (through the requirements for 'advertisement of the procurement' and 'provision of sufficient

[90] See also comments of the author with respect to these legislative amendments here: Georgieva, I., Doytchinova, A. (2014). Bulgarian Procurement: The Old Razzle-Dazzle. *CEE Legal Matters*. Available at: http://www.ceelegalmatters.com/index.php/component/content/article?id=358:bulgarian-procurement-the-old-razzle-dazzle [Accessed 18.5.2015].

information', as highlighted by Arrowsmith). The other aspects of this principle, relating to limitation of discretion, preventing discrimination and provision of opportunities for verification and enforcement, have, indeed, been reflected in the PPA (based on the requirements of the Procurement Directives), but fail to achieve the desired result as will become evident in the subsequent chapters of this research. It is precisely for this reason that Bulgaria has come to the absurd situation which perplexes the entire public, wherein EU reports (year after year) continue to demand increased transparency in public procurement regardless of the 'efforts' of legislators in that very direction.

In the course of this study and the analysis of the most common violations and corruption models in public procurement, the conclusion will emerge that whereas the other elements[91] required to achieve sustainability and integrity in public procurement are missing, any elaboration on the transparency principle as a means in itself will serve to no purpose. Or, as Lord warns: '[g]reater transparency will not necessarily promote democracy and good governance'.[92]

6. CONCLUDING OBSERVATIONS

Transparency emerged in response to the need of society to fight corruption, discrimination and abuse of governmental control in different spheres of life. It has crystallised as the public right to availability and accessibility of a certain level of information, presented in an understandable and clear manner, on the norms, rules, procedures and regimes, and the actions of participants: the information provided should always be sufficient for monitoring, verification and assessment. The significance of this principle and the achievement of its objectives has become a priority for a number of international institutions and organisations.

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[91] (a) elements of transparency, as a multi-layered concept, but also (b) elements of the control and prevention system for violations in public procurement (*e.g.*, the judiciary, the executive power *etc.*).

[92] See *supra* note 2, p. 3.

The principle of transparency is strongly covered in the regime of public procurement, where it has taken on certain specific characteristics. Secondary EU legislation stipulates requirements and restrictions on the parties involved in procurement procedures, aiming to ensure that the procedures are conducted in an open and fair manner. National legislation supplements these rules in compliance with the requirements of the Procurement Directives.

The major unresolved issues concerning transparency are the lack of a common definition and the notably varying positions of states regarding the value of this principle. In particular, the Bulgarian approach of transposing transparency rules shows a failure of understanding as well as a failure of the numerous attempts to put this principle in motion.

What is more, despite the continuous increase in transparency rules and the ever more complicated legislative basis, EU continues to claim that corruption in Bulgaria is growing[93] and the excessive transparency obligations imposed on contracting authorities remain merely a burden on the public procurement award process. 'The result is a ritualistic struggle over openness and privilege, with grave consequences'.[94]

What is missing in this puzzle and can the transparency principle be harnessed so as to become a useful tool in the fight against incontrollable corruption in public procurement are precisely the questions that the present study will seek to answer.

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[93] *e.g.*, Eurobarometer 2012 Report: *Public Opinion analysis - Homepage - European Commission*. [online] Available at: http://ec.europa.eu/public_opinion/index_en.htm [Accessed 18.5.2015]; the First EU anti-Corruption Report, Annex 2 Bulgaria, 3.2.2014: Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organised-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_bulgaria_chapter_en.pdf [Accessed 18.5.2015].

[94] Fenster, M. (2006). The Opacity of Transparency. *Iowa: Iowa Law Review*, vol. 91, p. 893.

Chapter 2

CORRUPTION – DEFINITION AND CHARACTERISTICS. THE BULGARIAN APPROACH

'Corruption and fraud are sometimes a matter of mentality.'

Alessandro Buticce, OLAF spokesman,
in an interview for the Bulgarian national television 'BNT'

Hardly a day passes without corruption being discussed as a hot topic in the media or even in small talk. Corruption is commonly described as the 'curse of humanity' and domestic governments and international organisations unite their efforts towards combating this phenomenon.

This study is also orientated towards the available options for combating corruption, and more specifically its manifestations in public procurement as well as the aspirations of transparency to act as the main instrument in this fight. Thus, the present chapter will examine, by way of introduction, the history of corruption, its elements and its various forms of manifestation, as well as its most common consequences. It then proceeds to discuss the main reasons for the abundance of corruption in Bulgaria, in the light of historical patterns and national specifics. Finally, the chapter deals with the perception of corruption in Bulgaria, in particular in the field of procurement, against the wider picture of corruption as a whole and based on recent empirical research carried out in

Bulgaria on the topic.[1]

The specific manifestations of corruption in Bulgarian public procurement and the attitude of the national legislator and the executive power towards this problem will be analysed in chapter 5. Accordingly, the comparison with other Member States and the common measures and action they take against corruption, as well as the evaluation of their results remain beyond the scope of the present text, as this topic will be investigated in detail in subsequent chapters.

1. CORRUPTION – COMMON DEFINITIONS

As opposed to the transparency principle, the definition of which is still subject to debate, as observed in chapter 1, a straightforward general definition of corruption has been almost unanimously accepted in the literature: the 'abuse of power', and this is discussed below. Still, despite this common definition, the different authors researching the phenomenon tend to expand on its characteristics and it has become widely recognised in society in all of its manifestations. Some authors however, argue that a unified definition of corruption is yet to be reached[2] due to its multifaceted structure and the clandestine nature of related activities, but this opinion refers rather to the different forms and elements of corruption than the term itself in its entirety.

While the abuse of power can take many forms, the most frequent and easily recognisable form of corruption involves any kind of bribery. However, any activity abusing legally delegated power for personal interest and benefit, no matter whether it takes the form of simple 'gift giving', fraudulent actions, provision of misleading information or unacceptable lobbying is also defined as corruption.

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1 *E.g.*, Pashev, K., Dyulgerov, A. and Kaschiev, G. (2006). *Corruption in Public Procurement – Risks and Reform Policies*. Sofia: Center for the Study of Democracy; Stoychev, S. (2007). *Corruption Violations in Public Procurement in Bulgaria*. Sofia: Transparency International Bulgaria; Konstantin, P. (2009). *Controlling corruption in public procurement: Indicators for assessing policy impact*. Sofia: Management Monitoring Association.

2 *e.g.*, Farrales, M. (2005). What is Corruption?: A History of Corruption Studies and the Great Definitions Debate. *SSRN Journal*.

TI supplements the general definition by describing corruption as the 'abuse of entrusted power for private gain', and distinguishes between 'according to rule' (*e.g.*, a bribe paid for a service, required to be implemented by law, where the purpose of the bribe may well be to procure the service more speedily) and 'against the rule corruption' (*e.g.*, a bribe paid to obtain services which are explicitly prohibited by law).[3]

Authors like Lambsdorff and Ackermann have also left their trace in theory by providing their own definitions of corruption, which have, with time, become textbook examples:

> '[C]orruption means the misuse of office for personal gain. The office is a position of trust, where one receives authority in order to act on behalf of an institution, be it a private, public, or non-profit. Corruption means charging an illicit price for a service or using the power of office to further illicit aims.'[4]

> 'Corruption, the misuse of public power for private benefit.'[5]

> 'Corruption occurs where private wealth and public power overlap. It represents the illicit use of willingness to pay as a decision making criterion.'[6]

Klitgaard's distinctive view on corruption proposes a different definition in his attempt to explain corruption using a mathematical formula, arguing that 'corruption is a crime of calculation, not passion'. The formula runs as follows: C=M+D-A, where '[c]orruption equals monopoly *plus* discretion *minus* accountability.'[7] His approach is rather

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[3] Available at: http://www.transparency.org/news_room/faq/corruption_faq#faqcorr1 [Accessed 19.5.2015].

[4] Klitgaard, K., MacLean-Abaroa, R. and Parris, H.L. (1996). *A practical approach to dealing with municipal malfeasance*. Working paper No 7, 1996, UNDP/UNCHS/World Bank-UMP, p. 1.

[5] Lambsdorff, J.G. (2007). The Institutional Economics of Corruption and Reform: Theory Evidence and Policy. *Cambridge University Press*, p. 1.

[6] Rose-Ackerman, S. (2006). *International handbook on the economics of corruption*. Cheltenham [u.a.]: Elgar., p. xvii.

[7] Klitgaard, K., MacLean-Abaroa, R. and Parris, H.L. (1996). *A practical approach to dealing with municipal malfeasance*. Working paper No 7, 1996, UNDP/UNCHS/World Bank-UMP; Klitgaard, R. (1998). International

different from the theoretical definitions mentioned above, but the concept is almost the same – monopoly (or power) and discretion (in other words the freedom to exercise personal judgement) without the necessary sense of accountability (liability, moral interdiction) will lead to corrupt actions. Due to this mathematical approach, Klitgaard also defended the proposition that the fight against corruption must reciprocally be more precise, calculated and focused on systematic actions. He proposed a more radical approach towards corruption by 'administering a shock to disturb a corrupt equilibrium.'[8]

At any rate, the definitions tend to be very close in meaning and cover the main characteristics of the phenomenon which can be summarized as follows: *(i) corruption is an action (or inaction) of an official in violation of the rules of his or her public position, (ii) it is commenced consciously and (iii) it is intended to bring personal benefit to the official, third parties or organisations involved, where (iv) the benefits are usually not (otherwise) accessible for the beneficiary*.[9]

1.1. FORMS

There is a wealth of literature resulting from research, studies and notes analysing corruption trying to categorize it. Although the definitions of corruption in most pieces of theory are similar to one another, as commented above, the form and level of corruption often differs according to nationalities, cultures, historical heritage and different level of development.

Nevertheless, the most widely-known and prevalent forms of corruption appear to be, in descending order of frequency of occurrence,

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Cooperation against Corruption. *Finance & Development*, pp. 3-6 and Klitgaard, R., MacLean-Abaroa, R. and Parris, H. (2000). *Corrupt cities*. Oakland, Calif.: ICS Press, p. 26.

[8] Klitgaard, R. (1998). International Cooperation against Corruption. *Finance & Development*, pp. 3-6.

[9] Except in the case of 'according to rule corruption', as explained by TI.

the following:[10]

(a) *Bribery* – This is the most common form of corruption. It is the act of paying in return for service, special treatment, and/or influencing a decision. The purpose of bribery is to gain personal benefit by receiving money, information, position, or the award of a desired project *etc.* Bribery may be related to or to cause the other forms of corruption listed below. UNODC[11] distinguishes several specific types of bribery, such as influence-peddling of privileges; offering or receiving improper gifts; bribery to avoid liability for taxes or other costs; bribery in support of fraud; bribery in support of unfair competition (which could be linked to the most common form of corruption in the public procurement sector) *etc.*;

(b) *Embezzlement, theft and fraud* – these involve individuals obtaining money, privileges or possessions to which they have access, but which they are not entitled to acquire;

(c) *Extortion* – this form of corruption uses the threat of violence or exposure of information to assure the cooperation of one or more individuals;

(d) *Abuse of discretion* – this is commonly seen in state or other public institutions, which have the opportunity to dispose of or purchase goods or services. UNODC[12] gives the example of an official responsible for government contracting who exercises his discretion to purchase goods from a company in which he holds personal interest. A variation of this form of corruption in the public procurement sector can be seen where a representative of the contracting authority chooses *e.g.*, as supplier, a company in which he or she has an interest or other connection and consequently benefits from the profit gained by the supplier as a result of the award of the contract; this frequently takes the form of the next type of

[10] In 2004 the United Nations Office on Drugs and Crime (UNODC) presented the 3rd edition of its Anti-corruption toolkit. It is one of the most comprehensive elaborations of the different categories of corruption. That paper is the basis of the summary presentation of the main forms of corruption: the UNODC categories have been followed.

[11] *Ibid.*

[12] *Ibid.*

corruption;

(e) *Favouritism, nepotism and clientelism* – this form of corruption is commonly encountered in countries which were previously behind the Iron Curtain,[13] such as Bulgaria. The abuse of power favours someone related to the official concerned (*e.g.*, a family member, or a member of the same political party, or a fellow-member of a particular group of people);

(f) *Conduct creating or exploiting conflicting interests* – the name of this form is self-explanatory, whereas, as UNODC also observes,[14] most of the other forms of corruption can be linked with the conflict of interest form (such as embezzlement and favouritism);

(g) *Improper political contributions* – this form involves improper attempts to influence the activities of a political party or its members, usually by 'donations' either to the political party itself or to a body linked to it.

(h) *Bid Rigging* – this form is associated mainly with the award of public procurements and infringement of competition rules in the sector; it relates to different forms of 'arranging' the outcome of a public procurement procedure between the bidders, with or without the consent of the contracting authority;

(i) *Kickback* – a form of bribery which has its place in procurement award; the contracting authority considers accepting a bribe which will be accounted for in the tendering process;

(j) *Conflict of interests* – the contracting authority (or a member or employee) is personally interested in the outcome of the procurement procedure.

Most of these forms of corruption can be for personal gain (individual corruption) or to ensure the adoption or application of a certain policy (institutional corruption).

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[13] The political, military, and ideological barriers erected by the Soviet Union after World War II to seal off itself and its dependent Eastern and Central European allies from open contact with the West and other non-communist areas.

[14] See *supra* note 10.

Of great significance for the manifestation of the different forms of corruption is the level of social and economic development of the country concerned, as well as the historical background of that country. To a large extent, these factors, along with the existing mindset and social mentality, play a role in the prevalence of certain corrupt practices and in the field in which they will be manifested, as will be explained further in this study. In this sense, an excellent addition to the definitions and characteristics of corruption is the opinion expressed by Boyadzhiev, Tsenkov and Dobrev that '[c]orrupt is not only the individual accepting (receiving) undue benefits. Corrupt is also the individual abusing public trust'.[15] For this reason the historical preconditions for the existence of corruption and the attitude of society towards this phenomenon are reviewed in this work (with a specific focus on Bulgaria).

1.2. ORIGINS

Corruption, both in its entirety and in its infinitely varied forms of manifestation is not in the focus of this study, but its origins and main historical and social milestones are important for the comprehensiveness and understanding of the conclusions of this research. With this in mind, the following discussion will briefly outline the roots of corruption and its development in the course of time and across the world, culminating in its current state in Bulgaria, as well as its forms in public procurement, which will be the subject of detailed discussion in the subsequent chapters of this study.

The historical roots of corruption as a world phenomenon go back to ancient times: the customary presentation of gifts for someone's benignancy is well-known in all countries. However, even in primeval days the moral principles of society drew a distinction between a simple gift given out of gratitude and a gift provided with the expectation of something in return. Later, the complicated state apparatus in the various nations began to require an increase in bureaucracy and, as a consequence,

[15] Boyadjiev, G., Tsenkov, E. and Dobrev, K. (2000). *Corruption in 100 answers*. Sofia: Civil Connection Foundation, p. 1.

other forms of corruption than straightforward bribery began to appear.

Historical evidence about corruption and the fight against it can be found as early as the 24th century BC.[16] One of the first documents discussing corruption is the Indian treatise *Arthaśāstra* from the 6th century BC. One of the two authors[17] of *Arthaśāstra* – Kautilya – describes around forty forms of embezzlement of government funds.

In more modern times, wars and the resulting hardship and privation constitute one of the main catalysts for corruption; hence it is mainly after the two World Wars and the massive-scale corruption which set in at that time that more serious analyses on the topic were carried out, and some attempts were made by the fragile democratic society to deal with the problem.

After World War I, ideas started to take shape towards creation of a global system against the acts of corruption. Investigations into the causes and consequences of corruption commenced and politicians began to search for the best weapon against this curse.[18]

Academic interest towards corruption escalated after World War II and especially in the fifties,[19] reaching a peak with the onset of the Cold War and the dissolution of the Soviet Union, as will be discussed further below with regards to Bulgaria as well – a time where widely quoted and well-known authors such as Johann Graf Lambsdorff, Rose Ackermann, Robert Klitgaard and many others were active.

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[16] One of the first rulers to dedicate a great deal of attention to fighting corruption was the ruler of the city of Lagash, Mesopotamia – Urukagina (c. 2380–2360 BC). The *Code of Urukagina* is known for its anti-corruption provisions and stipulated penalties. However, historical evidence indicates that his policy met with limited success.

[17] Kautilya and Vishnugupta.

[18] *e.g.*, This was one of the main goals of the so-called Progressive Era in the United States, when the idea crystallizes that exposure of political machines and their heads can serve as a weapon against corruption. In Europe, the idea of stronger government politics and the role of the elite class in constitutional governments (influenced by the Japanese intellectual leader Yoshino 1878-1933) as a reaction against corruption attracts followers in the wake of the WW I.

[19] *e.g.*, Authors of these times are: Banfield, E. (1958). *The Moral Basis of Backward Society*. New York Free Press; Banfield, E. (1975). *Corruption as a Feature of Governmental Organisation*, Journal of Law and Economics, vol. 18, issue 3, p. 587-605; Alatas, S. H. (1968). *The Sociology of Corruption: The Nature, Function, Causes and Prevention of Corruption*, Journal of Southeast Asian Studies, vol. 1, issue 02, pp. 142-143; McMullan, M. (1961). *A Theory of Corruption*, Sociological Review, ix; Nye, J. (1967). *Corruption and Political Development: A Cost-Benefit Analysis*, American Political Science Review *etc*.

Today, as the existence and increasing extent of corruption continues to give concern, whether at local, national or even international level, curbing corruption is a priority for many international organisations. Even though a catch-all instrument against corruption is yet to be found, the scrutiny of corruption lays bare its different manifestations, its causes and its negative consequences in different spheres of life.

1.3. CAUSES AND CONSEQUENCES

Based on the definition of corruption and its historical development, and considering its main and ultimate goal - personal benefit - the causes of corruption are relatively easy to determine. Usually, lack of governmental transparency is identified as the first precondition for flourishing corruption, combined with underpaid officialdom. Other noted causes of corruption include limited freedom of speech and freedom of the press, weak judicial control and concentration of power in the hands of unaccountable persons.

The different factors which could cause corruption also depend on the sphere of life concerned, such as the governmental, economic, political, and/or social environments. In all of these spheres corruption manages to find its niche and its systematic development may lead to catastrophic consequences. Perhaps the most negative consequences for a society suffering from systematic and increasing corruption are the *resulting hindrances for economic development* as well as the *growing climate of distrust in society*. Bulgaria is a particularly good case in point: the economic and political *status quo* is highly dependent on corruption, as will be demonstrated below.

2. INTERNATIONAL ORGANISATIONS AGAINST CORRUPTION

Numerous well-known organisations view the fight against corruption as one of their priorities, *inter alia*:

(i) *international organisations*, such as WTO, the World Bank, the International Monetary Fund, and the United Nations;

(ii) regional *organisations*, such as the European Union, the Council of Europe, the European Bank for Reconstruction and Development;

(iii) *trade union initiatives* such as the Trade Union Advisory Committee to the Organisation for Economic Cooperation and Development (TUAC to OECD);

(iv) *private sector initiatives* of the International Chamber of Commerce and the Business and Industry Committee to the OECD (BIAC to OECD), and

(v) *non-governmental organisation* such as Transparency International (TI).

Some of the findings of the present work are based on research carried out by these organisations, although not all of their initiatives are related particularly to corruption in the field of public procurement. Chapter 1 has already made a brief note of the work of WTO, OECD and TI; these three organisations investigate in detail the correlation between corruption and transparency and have been particularly active in analysing corruption in government procurement.

3. CORRUPTION IN BULGARIA

Given that a large portion of the present study is dedicated to corruption in public procurement in Bulgaria, this chapter will pay more detailed attention to the origin of corruption in Bulgaria, and the historical and economic factors which have brought the phenomenon to today's magnitude.

3.1. HISTORICAL EXPLANATION OF THE PREDISPOSITION TO CORRUPTION

Bearing in mind that the Bulgarian state is the oldest in Europe,[20] historical sources provide evidence of corruption and the offering of 'gifts', as well as of the fierce fight of Bulgarian khans against this problem, under the influence of the ways of the Byzantine Empire, dating as early as the 9th century. Records of the rule of Khan Krum indicate that the combat against corruption was one of his priorities, along with the measures against alcohol abuse and theft.[21]

Later on, as part of the Ottoman Empire, the enslaved Bulgarian population used elementary bribery on a daily basis in order to survive the oppressive conditions and the rocketing taxes which subjugated populations were obliged to pay their rulers. A historical fact worth noting in this context is that, written in precisely those times, the Ottoman Penal Code from 1857 (partially adopted in Bulgarian legal practice as well) contained very detailed provisions defining bribery and how it was to be sanctioned.[22]

After liberation from Ottoman yoke (1878) bribery, as well as other forms of corruption continued to be common and widespread behaviour. A start was made towards fighting corruption with the adoption of legislation such as the Law on Ministerial Liability (1880), which stipulated that a minister could be sued in the event of allegations that he/she places personal gain before state interests. Later, the Bulgarian Penal Code of 1896 criminalized bribery: the receiving party was liable to imprisonment

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[20] Established in 681 CE.

[21] In this context see, for example: Bojilov, I. and Gyuzelov, V. (1999). *History of Bulgaria in Three Volumes*. Sofia: Anubis Publishing, vol. 1, ch. 6.

[22] Elenkov, I. (1998). *Corruption in Contemporary Bulgaria: Analytical Overview*. ch. V, p. 2., which contains section III, entitled 'On Bribery' from the Ottoman Penal Code of 1857. 'A bribe is everything that is taken and given under any name in order to reach a goal: 'Gifts, small or big, given under any name or pretext, are regarded as a bribe…'; 'Where officials, appointed to offer state revenue for sale, are shown to take money from someone, or to sell state revenue at a lower price in order to fulfil personal interest although other buyers were also available, such officials shall be punished as embezzlers of state property'.

for 2 to 10 years.[23]

Elenkov[24] reviewed the development of different measures against corruption in Bulgarian penal legislation, and analysed in detail the special laws which were enacted to combat the phenomenon. Thus prior to the end of World War II the following laws were enacted: the Law on Prosecution of Illegally Enriched State Officials (1894); the Law on Mercenary Abuse of Office (1934), and the Law on Appointment of Family Members in State, Municipal and Autonomous Institutions (1935). Numerous decrees were also adopted, and many anti-corruption measures undertaken.

After World War II and the subsequent distribution of spheres of influence over European countries between Stalin and Churchill,[25] Bulgaria fell under Russian influence and, accordingly, a communist regime was introduced in the country, for a particularly extended period - from 1944 to the beginning of the 90s. During this period private property ownership was prohibited (real estate and material possessions could be acquired only under strict control of the state and in predetermined quantities), and the pursuit of material well-being was generally condemned (at least in theory) as 'capitalistic' and 'destructive'.

Slowly, but surely, the human desire to possess more (be it things, information or opportunities) or to simply reach out to and taste the 'worldly goods' of the western world prevailed over the communist ideal. And, in order to satisfy those neglected needs, people once again opened the door to corruption at all levels of social and political life. As Krastev[26] described it:

> 'Under communist rule dominated by an economy of shortages, corruption manifested itself in the form of bartering. In most cases, it took the form of exchange of influence and services – straightforward bribery was the exception rather than the rule.

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[23] *Ibid.*

[24] See *supra* note 22.

[25] *i.e.*, the so called informal 'percentage agreement' made during the Moscow Conference in October 1944, right after the end of the World War II.

[26] Krastev, I. (2002). *How to Control Corruption in Southeastern Europe: The Case of Bulgaria* in *Southeast European and Black Sea Studies Sofia*, Athens: ELIAMEP, vol. 2, issue 1, pp. 119-125.

> The monetisation of corruption as a business transaction between buyers and sellers has made it more visible and disruptive for the majority of the population.'

This form of 'bartering corruption' became habitual for Bulgarian society (as well as for the other countries behind the Iron Curtain) and, moreover, remained unpunishable and even tolerated for the entire period until the end of the Cold War in 1991. Consequently, the transitional period after the *Perestroika*[27] faced one of the most challenging issues in Bulgaria – how to change the mentality of a society which considers corruption as a normal and indispensable part of life. At state administration level, the idea that civil servants would expect to receive an additional incentive (in the shape of cash or a gift) and that this incentive would ensure the preferential treatment of the bribe-offering party, remained an integral part of national mentality for a very long time.

The transitional period saw an immediate increase in corruption, since centralized control over the phenomenon exercised by the former totalitarian elite, was lost; this was a time when governments began to enter the market of corruption independently. As Linarelli notes, 'The weakness of central government allows various government agencies to impose independent bribes, when entry into the market of corruption is free or relatively inexpensive, high levels of corruption result'.[28]

Some commentators[29] have argued that corruption in post-communist Bulgaria is basically different than the form practised in the times of the communist government. In other words, the 'bartering corruption' defined by Krastev became 'straightforward'[30] in the transitional period. Although there is some sense in this observation, it is only partially correct. Although it may be the case that corruption has changed to an extent, it is rather the *direction* than the *character* of corruption that has shifted. Since

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[27] Policy of governmental and economic reform instituted by M. Gorbachev in the Soviet Union during the mid-1980s.

[28] See Linarelli, J. (1998). *Corruption in developing countries and countries in transition legal and economic perspectives*. Public Procurement: Global Revolution, pp. 125 - 128. in Arrowsmith, S. and Davies, A. (1998). *Public procurement: Global Revolutions*. London, Part II, 7, pp. 125-139.

[29] Ellison, B. (2007). Public Administration Reform in Eastern Europe: A Research Note and a Look at Bulgaria. *Administration & Society*, 39(2), pp. 221-232.

[30] As described by Krastev – See *supra* note 26.

the simple needs of society for a better life have nowadays (more or less) been satisfied, the downfall of the Iron Curtain opened up new opportunities and new horizons for bribery. The privatization process or the accumulation of funds under operational programmes, including through public procurement procedures, are sufficient proof that corruption can most certainly remain undetected and not exactly 'straightforward', but still active on all institutional levels.[31] 'After the privatization process was basically completed, public procurement and concessions became a major sphere of large-scale corruption. Their place on the top of the pyramid of corrupt practices is determined by the large financial resources distributed within the public procurement system, and the related opportunities for personal enrichment.'[32]

At legislative level these specific manifestations of corruption are reflected and defined in the current Criminal Code (*Наказателен Закон*).[33] The offence which covers, to the largest extent, the characteristics of corrupt behaviour, is bribery.[34] Bribery is regulated by the Criminal Code (sec. IV, ch. 8 of the Special part). According to Bulgarian criminal law, a bribe can be passive or active. Considering the punishment provided, passive bribery merits a higher level of public reproach. In 2000 the legislator criminalized acts which were previously not punishable, such as the promise or offer of a bribe to an official, as

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[31] Completing the picture, Pashev notes as follows: 'In the early 1990's, when democracy and the rule of law were quite fragile, political corruption was mainly in the form of pumping resources out of the state-owned enterprises and their preparation for cheap privatization. The newly established private businesses stood at the input and output of state-owned enterprises with the participation of the management of the latter. Against the backdrop of the underdeveloped market economy and the price liberalization, they got the opportunity to bleed state-owned enterprises out and the state budget thanks to the soft budget constraints prior to the introduction of the currency board arrangements. Thus, the economic shock-therapy and financial liberalization of the early 1990's, together with the delayed structural reforms and the soft budget constraints, created opportunities for channelling assets of the public sector to privileged private groups. After the [*political and financial*] crisis in 1996-7 and the introduction of the currency board, those structures which were the main factor for the delay of the reform processes turned into major participants in the privatization.'; Pashev, K., Dyulgerov, A., Kaschiev, G. (2006). *Corruption in public procurement – risks and reform policies*, Sofia: Center for the Study of Democracy, Sofia, p. 12.

[32] *Ibid*, p. 13.

[33] Promulgated in SG 26/2.4.1968, effective as of 1.5.1968, as amended.

[34] Criminal Code, Art. 301.

well as the request or acceptance of such official to receive it.[35] Thus regulation of corruption within the Criminal Code now covers almost all forms of corruption. But '[r]egardless of the fact that the criminal law framework regulating corruption appears satisfactory, the results from the fight against the most severe forms of corruption are not particularly auspicious. […] [T]his is mainly due to two factors outside substantive criminal law. Firstly, offences related to corruption and especially bribery are difficult to prove because […] the interests of those who offer and those who accept the bribe tend, to a certain extent, to coincide. […] Secondly, the fight against the most significant forms of corruption is impeded by purely psychological stumbling blocks. Alas, Bulgarian society has, as yet, not developed a culture of intolerance towards corruption. The last few years, in particular, have seen the gradual recognition of corruption as an inevitable phenomenon, integral to power and government and it is regarded as somewhat normal that one will have to pay in order to exercise one's legal rights. This peculiar 'accustomisation' to corruption, which may gradually turn into standard behaviour, artificially lowers the negative public perception of the phenomenon.'[36]

In view of what has been discussed so far regarding the historical basis for the existence of corruption in Bulgaria, Smilov and Dorosiev's view that corruption in Bulgaria is a 'cultural' model is apposite.[37] The 'cultural' explanatory model, they argue, points out the two main groups of factors which have caused corruption in Bulgaria - the *first group*

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[35] *I.e.*, Criminal Code, Art. 304 *et seq*. Other examples of the PC incriminating corrupt behaviour in the wider sense are Criminal Code, Art. 282 – 'An official who violates or fails to fulfil his official duties, or exceeds his powers or rights for the purpose of acquiring a benefit for himself or for another, or to cause damage to another…', Criminal Code, Art. 283 - 'An official who uses his official position to acquire unlawful benefit for himself or for another…', Criminal Code, Art. 224 – 'A person who receives a gift or other material benefit in order to give, or because he has given, to a foreign country, foreign organisation or company, or to a foreign citizen, information from which considerable damage has ensued or may ensue for the economy…' *etc., etc*.

[36] Gruev, L. and Velchev, B. (2000). *Criminal Law Issues in Combating Corruption*. Sofa: Coalition 2000, pp. 14-15.

[37] *e.g.*, Smilov, D. and Dorosiev, R. (2008). Perception of Corruption in Bulgaria. A content Analysis of Interviews with Politicians, Representatives of Judiciary, Police, Media, Civil Society and Economy, Crime & Culture. *Discussion Paper Series No 16/2008*, p. 10. In this study Smilov and Dorosiev discuss two basic models which define corruption – 'rational' and 'cultural'. The 'rational' explanatory model, which defines corruption as the 'abuse of power' is considered by the authors insufficient to explain the roots of the corruption in Bulgaria.

includes the effect and consequences of the so-called 'communist heritage', while the *second group* 'includes factors such as the lack of specific social values to prevent corrupt behaviour and the existence of historically determined cultural patterns that facilitate the social tolerance of corruption. These factors go beyond the social habits immediately related to particular practices of corruption to include deeper characteristics of the political culture such as the perception about the just and fair functioning of democratic governance and society in general.'[38]

3.2. ECONOMIC FACTORS FOR CORRUPTION IN BULGARIA

Before focusing on the sector of government procurement in Bulgaria it would be necessary to review corruption and its factors from an economic perspective as well, in order to better understand the causes of corruption in this sector and to discuss the optimal comprehensive measures against it. Ganev[39] reviews the relation between economic factors and the state of corruption in Bulgaria in a very understandable and well-organised manner. His conclusions help outline the economic 'conditions precedent' for the increasing corruption in Bulgaria.

Ganev identifies three factors which determine the risk of corruption and the level of corruption:

(i) The value of the resources placed under the public official's control;

(ii) The level of personal discretion of public officials in managing those resources, and

(iii) The degree of accountability for the actions and decisions of public officials.

Based on these factors Ganev[40] analyse the level of corruption in

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[38] *Ibid*.

[39] Ganev, G. (1998). *Corruption and economic development in Bulgaria, in Corruption in contemporary Bulgaria: Analytical overview* in *Corruption in contemporary Bulgaria: Analytical overview*, Sofia: Transparency International – Bulgaria, Policy Paper, ch. VII, p. 56.

[40] *Ibid.*

Bulgaria, concluding that throughout the totalitarian system and the subsequent transitional period, the amount of the resources under state control was significant, the level of personal discretion was high, and the degree of control was ineffective.

Ganev also studies the factors determining the demand and supply for corruption. The supply of corruption correlates mainly to the anticipated consequences for the respective public official, *e.g.*, material losses, which the public official in charge may suffer in case of disclosure of his/her corrupt behaviour; the amount of those losses, the moral principles of the officials *etc*. The demand for corruption, however, depends on much more specific conditions, which Ganev divides into four types:

(i) The number and nature of the permissions and/or licensing regime – the more complicated the regime, the greater the possibilities for corrupt practices, since any permission regime is usually viewed by traders as an obstacle to their business activities;

(ii) The tax system – Ganev argues that entrepreneurs are ready to offer bribes in order to decrease their tax liabilities;[41]

(iii) The total value of state-supplied goods – traders are willing to bribe in order to 'buy low and sell high', and

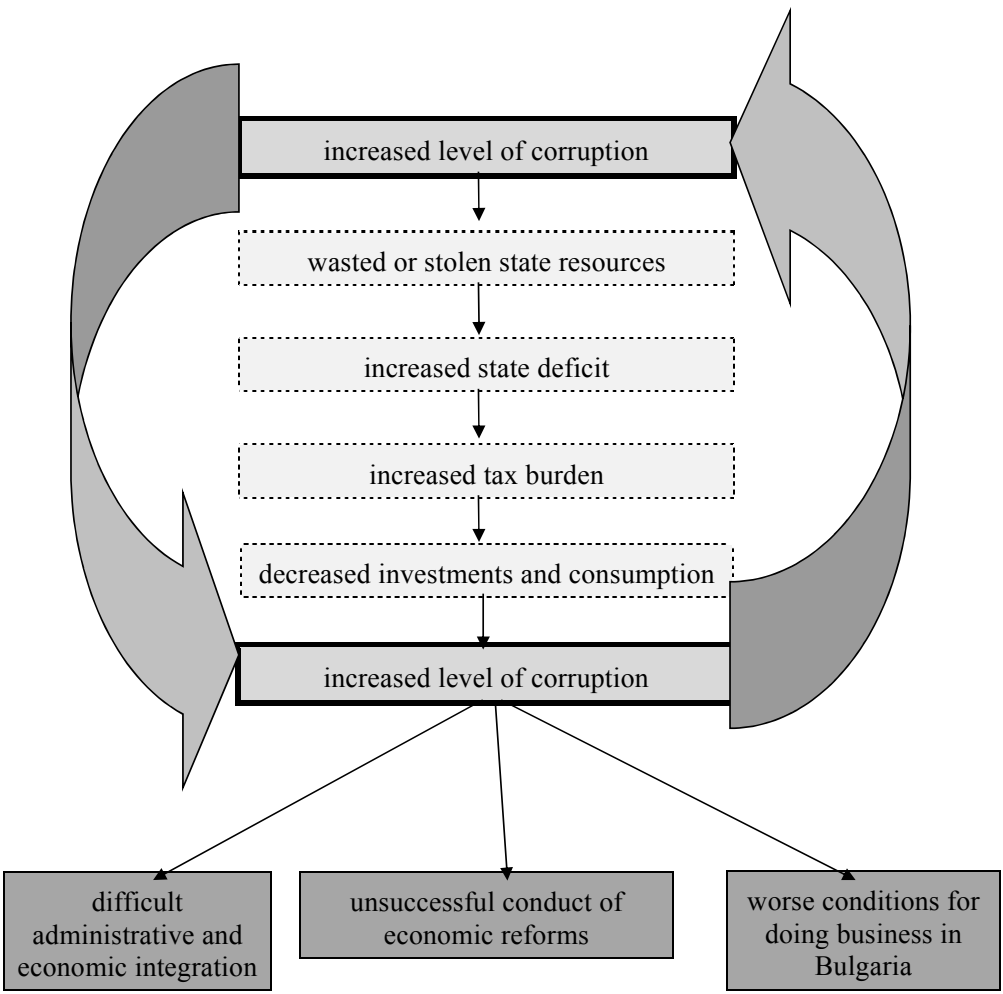
(iv) State expenditure on goods and services – this factor is directly connected to the public procurement regime in the country and therefore is of a particular interest for the present work. This factor attracts increasing corruption, as the state authorities have to decide how and to whom to distribute enormous amounts of public funds. Needless to say, entrepreneurs are anxious to win procurement contracts and to sell their services and/or productivity in large quantities. Or, as Ganev opines at the beginning of his study: 'Corruption always occurs when an 'outside' resource is placed under somebody's control.'[42]

Ganev also reviews the macroeconomic effects of corruption in Bulgaria as well as the ability of the state to react. He concludes that

[41] *Ibid.,* p. 56.

[42] *Ibid.,* p. 57.

corruption in Bulgaria causes financial instability due to certain connected issues, which can be conveniently illustrated in the following diagram:



As a general conclusion, all of the effects of corruption sketched above reflect the quality of the economic environment in Bulgaria. Ganev[43] presumes, in addition, that 'the entire institutional framework […] is distorted', where one of the expressions of this distortion is that mistrust has become the conceptual economic behaviour in Bulgaria, as is the willingness to breach norms.

In light of the above, the latest EU country report for 2014 sounds somehow sadly familiar: 'Corruption remains a persistent problem in Bulgaria, potentially deterring investment and undermining the quality of government services. The policy challenges [...] include a lack of overall strategy and coordination, institutional shortcomings, and a weak track record on reaching final convictions in court, especially in cases involving high-level corruption.'[44]

4. CORRUPTION IN BULGARIA IN FIGURES

The TI's CPI[45] and the Corruption Monitoring System (CMS), developed by the Center for the Study of Democracy, Bulgaria[46] present the generally accepted and recognisable statistical data on the level of corruption in the country over the last almost two decades.[47] These two independent institutions frequently examine procurement corruption in Bulgaria, hence their achievements and conclusions merit further analysis.

The present section, however, will only address the statistical aspect of their activity in order to provide a visual representation of corruption levels in Bulgaria: (a) as compared to global trends, and (b) as assessed at

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43 *Ibid*, p. 63.

44 *Country Report Bulgaria 2015 including an In-Depth Review on the prevention and correction of macroeconomic imbalances* (2015), Brussels SWD(2015) 22 final, p. 55-56.

45 As an international barometer of corruption, together with the Global Corruption Barometer.

46 As a domestic complex of indexes measuring the level of corruption in Bulgaria.

47 The activities of these two organisations - the local branch of the international TI and the local organisation Center for the Study of Democracy - will be discussed in detail in chapter 4 of this work.

local level.

The *modus operandi* of the CPI, as well as the CMS, is open to criticism for lack of objectivity and reliability. Because corruption inherently manifests itself behind the scenes and exists as furtively as possible, it is obvious that there can be no valid method that could clearly reflect the volume of corruption in a given country. For this reason the two indices use somewhat hypothetical and subjective formulas based on the perception, estimate and attitudes of the examined population sample.

4.1. CORRUPTION PERCEPTION INDEX

Since 1995 the international anti-corruption organisation TI publishes the CPI on an annual basis, which allows for international comparisons of corruption based on the subjective perceptions of businessmen, experts, risk analysts and citizens.[48]

The index created by TI is currently deemed to be the most reliable source of information on the corruption status round the world. As described by the TI itself:

> '[it] is a composite index, a poll of polls, drawing on corruption-related date from expert and business surveys carried out by a variety of independent and reputable institutions.'[49]

CPI ranks more than 170[50] countries in terms of corruption, by the use of at least three reliable, high quality data sources, published no earlier than within in previous two years. These are usually polls and surveys

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[48] 'It is the deep conviction of the authors of the corruption index that in an area as complex and contradictory as corruption there may exist a single source or survey method, to provide the ideal framework model with a sufficiently wide coverage of countries and fully convincing methodology for comparative study. That is why the corruption index is designed based on the generalized index method. That is, it is composed of reliable studies that use different methodologies and framework models and is statistically the most convincing means of recording subjective perceptions of corruption', *Corruption and Anticorruption* (2003). Sofia: Center for the Study of Democracy, p 238.

[49] *Frequently Asked Questions*. Transparency International Corruption Perception Index 2009; Available at: http://www.transparency.ch/de/PDF_files/CPI/CPI2009_FAQ.pdf. [Accessed 20.5.2015].

[50] 177 countries for 2013.

which rank different countries and territories.

Bulgaria was included in the CPI for the first time in 1998 and was awarded an index value of 2.9. Ever since then the annual CPI values in Bulgaria have gradually come to be favoured by the media and civil society as a key indicator and an objective measure of the level of corruption in the country.

The author of the present study does not share the opinion that, with regards to Bulgaria, the CPI provides the most objective picture of corruption and its national manifestations. The CPI index is quite limited in terms of its methodology, and the following points demonstrate its shortcomings:[51]

(a) It is based entirely on subjective factors and assessment of the development and spread of corruption;

(b) The CPI does not use its own studies on the prevalence of corruption but rather relies on independent studies and expert assessments;

(c) The index predominantly takes into account cases of bribery and extortion in the business field, without reflecting a number of other significant forms of corrupt practices. In this sense it is completely superfluous in assessing corruption schemes in public procurement, although in Bulgaria it is this index that is most often identified as a corrective in the field;

(d) The CPI has been criticized for its one-sidedness as it only reflects the corruption of the 'taking', but not of the 'giving' parties;

(e) The CPI is unable to measure trends in the prevalence of corruption, although it is often interpreted that way. In this sense it can hardly be seen as a measure of the success of ongoing anti-corruption policies and reforms;[52]

(f) The CPI does not reflect in any way the national, economic and

[51] Despite the fact that the initial CPI was later supplemented by the Global Corruption Barometer based on their own sociological polls, reflecting not only the perceptions of the respondents, but also their experience of involvement in corrupt acts.

[52] In this connection see also: Galtung, F. *Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices* in Sampford, C. (2006). *Measuring corruption*. Aldershot, England: Ashgate.

political characteristics of the surveyed countries. In this sense post-socialist and Balkan countries (Bulgaria falling within both categories) are traditionally considered corrupt. Therefore, even if corruption at all levels of government has actually declined considerably, the CPI will not reflect this positive change for a long time as it relies solely on the subjective perceptions of respondents, which often do not reflect the actual situation;

(g) TI uses sources from the previous two years for its annual CPI. These sources might mirror perceptions of society which, in turn, have been formed further in the past. That is why any significant changes in the CPI are only likely to emerge over longer periods of time.

Despite the above criticism towards the final figures reached by the CPI and the conclusions drawn on their basis, it would, nevertheless, be useful to present a summary of the results for Bulgaria from its first year in the index up to the present date, in order to establish some basis for comparison with other countries.

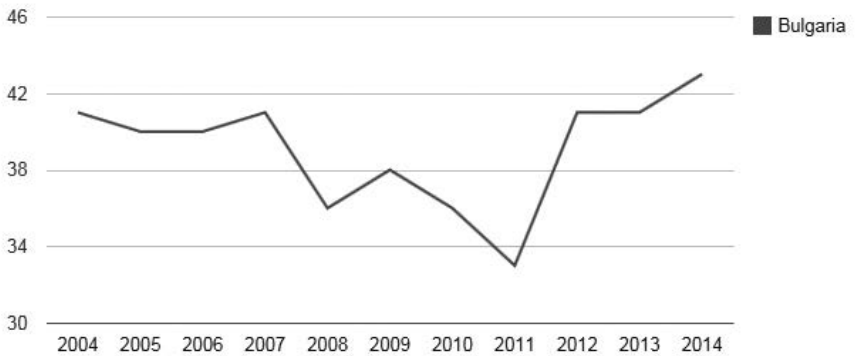
The CPI for the period between 1998 and 2008 establishes Bulgaria as a country with a moderate level of corruption. The index indicates improvement for the period between 1999 and 2002 (from 3.3 to 4) and relatively stable scores for the 2002 - 2007 period (figures vary for those years from 3.9 to 4.1). Against this background, a significant drop was registered in 2008,[53] and that low score of 3.6 was almost exactly reproduced in 2009 with a small improvement to 3.9. The CPI score for Bulgaria in 2012 and 2013 is 41.[54] In 2014 the value changes by only +2 points in comparison to 2013 and reaches 43, which is the average value for all 175 countries examined. The results of the index for 2014 reveal

[53] A particular example of the evaluation of Bulgaria as a country with increasing corruption in 2008 was the 'shattering' report of OLAF from July 2008, which mysteriously leaked to the media and was made publicly available. In this report OLAF described Bulgaria as a country which tolerated fraud, money laundering, and forgery *etc*. In particular it exposed the criminal activities of one organisation in Bulgaria, which was under investigation for SAPARD projects fraudulently funded with EUR 7.5 mln. in cash. The report also noted that Bulgaria had harmed the EU's financial interests to the extent of over EUR 32 mln. due to fraudulent and corrupt actions concerning SAPARD projects.

[54] The current assessment system uses a scale of 0 (highly corrupt) to 100 (very clean).

that the positive development is due to the general improvement of the economic environment at European level – a trend which is reflected in Bulgaria as well. With this score, Bulgaria draws level with Greece and Romania, sharing the 69th position.

The chart below illustrates the movement in CPI over the last decade.[55]



4.2. CORRUPTION MONITORING SYSTEM

CMS is the first of its kind in the post-socialist countries and has been successfully applied ever since the 1990s, being subsequently included in the United Nations Anti-Corruption Toolkit[56] and assessed by the UN as 'the best national corruption monitoring system'.

CMS provides data on the prevalence and dynamics of corruption among the public and in the business sector. The study group includes representative samples of different social strata, public servants and

[55] Source: TheGlobalEconomy.com, (2015). *Global economy, world economy | TheGlobalEconomy.com.* [online] Available at: http://www.theglobaleconomy.com/ [Accessed 5.6.2015] and Transparency International.

[56] In 2011 CSD joined the UNCAC Coalition, also known as The Coalition of Civil Society Friends of the UN Convention against Corruption.

business executives, press, radio and television media monitoring *etc*. CMS records the actual level and the trends in the spread of administrative corruption in the country, as well as the related public attitudes, opinions and expectations. It uses nationally and internationally tested indicators to assess the level of corruption and the public attitudes towards it.

CMS is a system comprising four different categories of indicators that vary in their ultimate research goal:

(a) The first set of indicators explores the *attitudes towards corruption* - the extent to which Bulgarians perceive corrupt behaviour of MPs and public sector employees through the prism of their own value system. It explores the susceptibility of the population to corruption and in particular the susceptibility of public sector employees to corrupt behaviour;

(b) The second group of indicators examines *corrupt behaviour itself* - the so-called 'corruption pressure', both on citizens and on public employees. These explore the extent of actual use of corrupt schemes by analysing the specific manifestations of corruption (from the most commonplace offering of gifts to an employee to the more serious forms of abuse of power);

(c) The third set of indicators reflects the *assessment of the size of corruption* according to the population during the monitoring period, the degree of manifestation of corruption and the actual result of corrupt behaviour;

(d) The last group of indicators analyse the *corruption expectations* of the public for effective limiting of corruption in the country.[57]

By applying this highly developed methodology, CMS enormously expands the scope of its analysis, using various sources of information and different methods of assessment, specifically designed for the country and the attitudes of the Bulgarian population to the spread of corruption. Last but not least, this helps achieve comparability between the information collected and processed for Bulgaria on the one hand and the information

[57] The methodology adopted by the CMS is detailed in the work of the Center for the Study of Democracy from 2003, entitled *Corruption and Anticorruption*, Sofia: Coalition 2000, pp. 229-237.

about other European countries on the other. The CMS Report provides data from international comparative studies, reflecting different aspects of corruption.

A major difference between CMS and CPI is precisely that in addition to public attitudes and perceptions, CSD's system also registers the actual distribution and manifestation of corruption in Bulgaria, thus allowing for a much more thorough analysis of corrupt processes in the country and therefore contributing to the search for different and effective methods of prevention. The subjective assessments offered by CPI may sometimes distort the actual situation in the country within the period covered, while CMS completes the picture and provides significantly more detailed and personalized data enabling assessment of the negative and positive trends in the levels of corruption in the country. That is why, it should be noted, that with respect to Bulgaria, the CMS set of indicators is far more objective in reflecting corruption levels and trends.

The CMS index shows a significant and constant decrease in the involvement in corrupt transactions (from 1.0 to 0.3) as well as in corruption pressure (from nearly 2.1 to 0.8) for the period between 1998 and 2004. However, after 2004, CMS registered a rising trend in the corruption rate among the Bulgarian population. In this respect, CMS gave a 0.7 score for involvement in corruption transactions and a score of 1.7 for corruption pressure in 2008. These results show that Bulgaria witnessed a slowdown in its anti-corruption efforts in the years just before and right after its accession to the European Union.

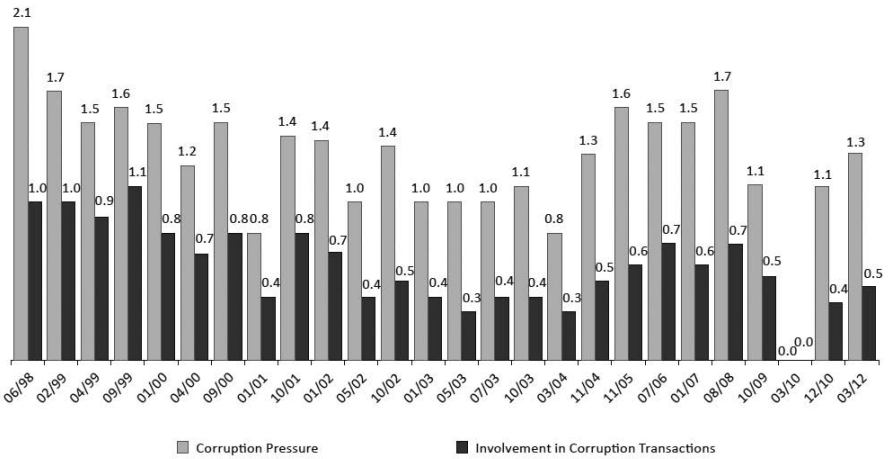
Since 2009 a certain improvement compared to the previous periods has been observed in the Index concerning corruption pressure and involvement in corrupt transactions, as part of the complex CMS. A general trend of declining numbers of people who were involved in corrupt transactions in the 1999 – 2013 period became noticeable. For 2012 and 2013 this trend was reversed, and the number of participants in corrupt practices increased.

> 'Subjective assessments by citizens indicate that corruption has been growing in recent years. Corruption practices are perceived to get more widespread, with the index going up from 6.1 in 2010 to 6.7 in October 2013. Even stronger is the increase in the perception of the practical efficiency of

corruption (the probability of resolving problems by means of corruption). That index changed from 5.9 in 2010 to 6.9 in 2013.'[58]

According to the latest report of the Center for the Study of Democracy published in 2014, the CMS has registered the highest levels of participation of the Bulgarian population in corrupt transactions for the last 15 years.[59] Over the last year approximately 158,000 corrupt transactions were carried out on a monthly basis. What is even more striking, against this generally negative picture, is the fact that the percentage of those requesting a bribe is falling at the expense of those offering a bribe without a request. The report draws particular attention to the public procurement sector as one with an increasing and generally high risk of corruption.

The graph below illustrates the comments so far.[60]



[58] *Corruption and anti-corruption in Bulgaria (2012 – 2013)* (2013). Policy Brief No. 43/2013, Sofia: Center for the Study of Democracy.

[59] In its *Anti-Corruption Policies against State Capture* - Annual Corruption Assessment Report, the Center for the Study of Democracy provides an overview of the state of corruption and anti-corruption in Bulgaria for the period of 2013- 2014. The report is produced within the framework of the Southeast Europe Leadership for Development and Integrity (SELDI).

[60] Source: Center for the Study of Democracy.

5. CORRUPTION IN GOVERNMENT PROCUREMENT – A GLOBAL REVIEW

The economic significance of public procurement in Europe is considerable. Despite the fact that not all areas of public expenditure are covered by public procurement rules, the size of the market reaches EUR 447 billion (19% of EU GDP) in 2010[61] and slightly decreases, due to the financial crisis worldwide, to EUR 425 billion in 2011[62] as per statistics. According to the study '*Identifying and Reducing Corruption in Public Procurement in the EU*'[63] conducted in 2013:

> '[T]he direct public loss encountered in corrupt/grey cases amounts to 18% of the budgets involved, while this figure is 6% in clean cases. Hence, the overall public loss due to corruption is estimated at 13% (rounding errors), thus explaining over 2/3 (69%) of the direct public losses of corrupt/grey projects.'[64]

Understanding government procurement as a public sector activity which operates with the state budget and re-distributes public funds to the private sector (in most cases) in return for the supply of goods and services readily brings to mind the 'thin line' between procurement and corruption.[65] The tempting opportunity for entrepreneurs and traders to gain benefit from the distribution of public funds has been one of the most commonly encountered reasons for 'abuse of power' for many decades. In Grødeland's words:

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[61] Based on total estimated value of tenders published in the Tenders Electronic Daily (TED), according to the *Annual Public Procurement Implementation Review 2013*, Brussels, 1.8.2014, SWD(2014) 262 final, p. 5.

[62] *Ibid*.

[63] *Identifying and Reducing Corruption in Public Procurement in the EU - Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anti-corruption*.(2013), prepared for the European Commission by PwC and Ecorys, with support of Utrecht University.

[64] *Ibid*, p. 174.

[65] The Procurement Directives and the New Procurement Directives deal with the term 'corruption' as defined in Art. 3 of the Council Act of 26.5.1997 OJEU C 195, 25.6.1997, p. 1, and Art. 3(1) of Council Joint Action 98/742/JHA OJEU L 358, 31.12.1998, p. 2 respectively.

> 'Given the large sums of money involved in public procurement, it is not surprising that a number of individuals and groups have vested interests in promoting certain outcomes with regard to public tenders.'[66]

In addition, the whole process of participating in one procurement procedure and the preparation of a cost-efficient offer is a time consuming and expensive process and therefore many candidates decide to reinforce their chances by engaging in corrupt activities such as bribery. Moreover, most of the candidates take the view that 'everyone else is involved in such kind of business.'[67]

The forms of corruption in procurements are as many as the imaginations of participants – from bribery, through fraud to abuse of discretion. The different manifestations of corruption depend on the type of the procurement (construction, supply *etc.*), the type of the procedure (open, restricted, competitive dialogue *etc.*), the type of the contract to be concluded (with fixed price or not, framework contract *etc.*) and of course the personal interest involved. The most common forms of corruption in the public procurement award process remain 'bid rigging', 'kickbacks' and 'conflicts of interest' (where in the case of procurement procedure the contracting authority is personally related to the winning bidder).[68]

Corruption can occur at any phase of the procurement process; however, the most common cases of corruption are connected with the candidate qualification/evaluation phase. Due to the fact that contracting authorities are often (depending on the domestic legal framework) free to decide the methodology of evaluation of candidates, the respective instance of corruption may very well remain undetected. The contracting authority is always interested, in its capacity of a bribe-taker, to motivate the evaluation of candidates in such a way that the 'impartially chosen' winner would appear, beyond all doubt, to be the candidate who has

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66 Grødeland, A. (2005). *Bulgaria, Czech Republic, Romania and Slovenia: The Use of Contracts and Informal Networks in Public Procurement* in *Fighting Corruption and Promoting Integrity in Public Procurement*, Publishing OECD, ch. 7, p. 60.

67 See Søreide, T. (2002). *Corruption in public procurement: Causes, Consequences and Cures*. Bergen, Norway: Chr. Michelsen Institute, Development Studies and Human Rights, p. 4.

68 See *supra* note 63.

presented the most economically advantageous tender. Where the procurement criterion is the lowest price, the corrupt practices regarding candidate qualification are, naturally, somewhat more sophisticated.[69]

The specific hypothesis of corruption in procurement procedures and at the different phases will be studied in detail in the next chapters of this work. This chapter discusses the most common and possible types and phases of occurrence of corruption as presented in the table below. For these purposes the procurement process may be divided into four main phases (without taking account of the differences between the separate procedures):[70]

(1) *Choice of Object Phase* - in which the contracting authority decides that it needs to purchase goods, procure construction work, or have certain services performed. In this phase the contracting authority determines the basic parameters of the procurement, such as technical specifications, presumed price, and the period concerned; it also calculates the budget for the procurement. This phase concludes with the choice of a particular procedure and the decision to commence the procurement procedure.

(2) *Announcement Phase* – in which the contracting authority and the experts (if required) prepare the compulsory documentation for the launch of the procurement procedure (such as the official announcement of the procedure, the application forms, the technical specifications and other parameters of the procurement).

(3) *Procedure Conduct Phase* – this is the core phase of the whole procedure, involving the contracting authority and all participants/approved candidates. In this phase potential bidders have a limited period to present their offers/applications; the contracting authority examines the offers and may make a preliminary selection of candidates; the contracting authority ranks the candidates and

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[69] In this respect it would be interesting to track practice following transposition of the New Procurement Directives and (at least theoretically) the elimination of the lowest price criterion. This point is discussed in relation to corrupt intent during the award process in the following chapters of this study.

[70] In this context see also *Bribery in public procurement: methods, actors and counter-measures* in *Public Procurement rules procedure and practices.* (2007). Publishing OECD, pp. 19-22.

announces the winner. This phase is considered most susceptible to corruption, as bidders may seek to bribe the contracting authority prior to or during the evaluation of the tenders.

(4) *Contract Implementation Phase* – this involves the conclusion of the contract between the contracting authority and the successful bidder, as well as the performance of all contractual obligations.[71] Corruption here is also frequent, as it is mainly the procurement award that is in the focus of regulation, while control over implementation often takes a backseat (as is the case with the Bulgarian model). This trend is expected to change as a result of the much more strictly defined cases in which lawful amendment of a concluded procurement contract is possible under the New Procurement Directives. Whether or not this will achieve a (satisfactory) result in most Member States remains to be seen.

The table below[72] contains the most frequent elements of corrupt policies with regards to the phases of the award process listed above:

Procurement process phase	**Manifestation of corruption**
Choice of Object	- the contracting authority is corruptly requested by the interested party to open a procurement procedure which does not correspond to the contracting authority's justifiable need for particular services and/or goods; - the contracting authority is corrupted by the interested party so that the contracting authority's correct appraisal of the type of the procedure to be conducted is shifted *etc*.

[71] This outcome is initially uncertain, as the contracting authority may decide to award the contract to none of the bidders. Such an outcome rarely involves corrupt practices and is therefore not discussed further.

[72] Provided for the purpose of comprehensiveness of this section but with no claims to exhaustiveness, as this topic will be the object of analysis of the next few chapters.

Announcement	- the contracting authority is corrupted by the interested party so that the parameters of the procedure chosen suit the interested party's candidate; - the contracting authority is corrupted so that the assessment criteria and/or the methodology of the formula used for determination of the winner of the procedure are presented in a vague and ambiguous manner; - the contracting authority is corrupted so that the procurement requirements are phrased in such a way that some of the possible bidders are automatically excluded from participation *etc.*
Procedure Conduct	- the contracting authority is corrupted by the interested party to provide confidential information about the tenders submitted by other participants in the procedure; - the contracting authority is corrupted in order to misrepresent the evaluation of the candidates; - the contracting authority is corrupted in order not to examine the possible use of subcontractors by a particular bidder; - the contracting authority is corrupted to accept and assess additionally provided and manipulated information/documentation not contained in the offer at all *etc.*
Contract Implementation	- the contracting authority is corrupted to accept substantial changes in the preliminary draft of the procurement contract which fundamentally alter the parameters of the procurement from those initially announced.

As for those involved in corrupt schemes in public procurement, it must be noted that in addition to the purely 'briber-bribed' scheme, the specifics and complexity of the award process involve many persons up to the final decision of the contracting body (e.g. experts, committee members, consortium members). The participation of numerous different actors in a corrupt scheme renders its detection all the more difficult. Moreover, public spending whets the appetites of political parties and 'the powers that be' in government. For this reason, in some countries (including Bulgaria), where there is a lack of sufficiently independent bodies to exercise control over the award process, the burden falls on legislation in the field. This leads to rules created and coordinated by decision-makers which leave corruption loopholes in the regulation of the award process; and, further, to the absence of effective control.

6. CORRUPTION IN GOVERNMENT PROCUREMENT – INTRODUCTORY OVERVIEW OF THE BULGARIAN CASE

Corruption can, beyond dispute, be detected in Bulgarian public procurement system in all its manifestations. Despite some slightly optimistic assessments[73] of the level of corruption and the anti-corruption measures launched in Bulgaria in the last decade, corruption in procurement always remains at the forefront of all negative discussions. Some of the particular issues which work towards creating such an inseverable link between corruption and procurement deserve attention here. The various manifestations of corruption in the different procurement procedures will be dealt with subsequently. Based on the assessments of the quality legal regulation of procurement in Bulgaria, literature[74] on the topic currently notes *inter alia* the following factors which facilitate corrupt practices in the public procurement sector: poor regulation of the various procedures; an insufficient level of transparency in the conduct of

[73] *e.g.*, Anderson, J.H. and Grey, Ch. W. (2006). *Anti-Corruption in transition 3: Who is succeeding… and Why?*, The International Bank for Reconstruction and Development / The World Bank.

[74] Based on reports of Transparency International Bulgaria, Center for Study of Democracy, the Bulgarian Public Financial Inspection Agency *etc*.

the procedures; predominantly *ex post* control over the conduct of the procedures (*ex ante* control exists, but it is not well developed and does not yet show any positive results); possible amendments to the contract following conclusion of the public procurement procedure, lack of publicity with respect to concluded procurement contracts.

Most of these issues do indeed originate from the legal framework regulating public procurement and could possibly be remedied. However, the experience of the Bulgarian legislator unambiguously demonstrates that after almost thirty amendments and supplements to the applicable legislation the results are far from perfect. As Linarelli observes,

> '[t]he elimination of corruption in public procurement in developing and transitioning countries depends on much more than good procurement rules. It will depend on long-lasting and credible reform of the executive, legislative and judicial organs of state that surround the procurement system and upon which a properly functioning procurement system depends for its viability. There are no easy solutions to combating corruption.'[75]

Corruption in the procurement sector is further facilitated by the deliberate over-bureaucratization[76] of public procurement procedures. The high number of bidding requirements and the administrative burden induces participants to seek political patronage in order to circumvent requirements and rules. With the expected transposition of the New Procurement Directives, and with view of the ambitious programmes which each subsequent government pledges to undertake, one of the aspects on which reforms in the field are expected to focus will be precisely a reduction of the administrative burden, lightening of procedures and gradual transition to e-procurement. It is still too early to make conclusions as to how exactly these plans will reflect on national legislation, as the latest Bulgarian legislative changes discussed in this study give no hope for any speedy simplification of the burdensome

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[75] See *supra* note 28.

[76] In this context see also Boyadzhiev, G., Tsenkov, E., Dobrev, K. (2000). *Corruption in 100 Answers*. Sofia: Civil Connection Foundation, pp. 34-35.

procedures.

Last but not least, the global economic crisis has had its effect on Bulgaria as well, increasing competition between companies over public contracts and giving an additional impulse to both politicians and administration to obtain corruption fees. In this connection the political instability in Bulgaria and the frequent change of polarized governments with either pro-Russian or pro-Western political and economic influence also play a part. The latter in particular has a disastrous effect on the legislative framework of public procurement which is the inevitable subject of numerous modifications, many of which are dictated by purely political considerations.

Naturally, the losses incurred as a result of application of corruption policies in the organisation, award and implementation of public procurement in a small country such as Bulgaria are enormous. Taking in mind the national historical and social characteristics of corruption, as outlined above, it would be perfectly justifiable to assume that the amount of the bribe offered in order to win the contract, might be negligible against the background of other benefits and privileges offered (including career advancement and political office) and also against the background of the direct economic damage and the loss of investment which are the natural consequence of increased corruption in the sector. This is precisely the angle of the study entitled 'Corruption in Public Procurement'[77] which calculates losses due to corruption as a percentage of national GDP and reach the conclusion that: 'if we abandon all conservative assumptions underlying the abovementioned optimistic estimate of the fiscal losses from corruption in the public procurement sector, they could reach 1 billion levs annually, *i.e.* some 20 - 25% of the size of the market or approximately 2.4% of GDP.'[78]

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[77] Pashev, K., Dyulgerov, A., Kaschiev, G. (2006). *Corruption in public procurement – risks and reform policies*, Sofia: Center for the Study of Democracy, pp. 29-30.

[78] Bearing in mind that the study was published 8 years ago and current figures will probably be slightly different but this in no way affects the conclusions drawn.

7. ANTI-CORRUPTION RULES IN THE PPA – DO THEY COUNT?

The PPA reflects the main anti-corruption clause of EU Procurement legislation concerning the exclusion of tenderers from a public procurement procedure in case of detected corruption.[79] [80] However, as to other anti-corruption provisions, the multitude of changes and amendments to the law reflect the unsuccessful 'legislative exercise' which Bulgarian governments have been practising over the last few years. In addition to the persistent increase of useless rules which inhibit the award procedure and merely elaborate on the idea that the entire file for any given procurement must be publicly available, the PPA includes a considerable number of anti-corruption rules and systems of rules aimed at combating restriction of competition in the sector[81] which, however, are wholly ineffective.

In support of this conclusion, several examples of PPA rules are set out below. These purportedly define 'traditional' clauses, recognisable for the European legislator and ostensibly based on the objectives set out by the Procurement Directives but, when interpreted by Bulgarian legislation, are simply not applied and fail to secure the desired anti-corruption goals.

(a) *Blacklisting*

The PPA[82] provides that the Executive Director of the Public Procurement Agency must maintain a list of the persons in respect of whom non-performance of a public procurement contract has been

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[79] Pursuant to Directive 2014/18/EC, Art. 45(1)(b) of 'Any candidate or tenderer who has been the subject of conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract: […]; (b) corruption […].'; Directive 2014/24/EU, Art. 57(1)(b) of is couched in the same terms.

[80] PPA, Art. 47(1)(b).

[81] Non-restriction of competition is also one of the sub-aspects of the transparency principle, according to Arrowsmith, S. (2005). *The Law of Public and Utilities Procurement.* Sweet and Maxwell, pp. 127-128 and Arrowsmith, S. (2014) *The Law of Public and Utilities Procurement – Regulation in the EU and UK*. vol. 1, Sweet and Maxwell, p. 155 and pp. 164-166.

[82] PPA, Art. 19(2), it. 25.

ascertained by an effective judgment of court. This provision obviously aims to implement Article 45(2) of Directive 2004/18/EC, which provides for the exclusion of economic operators on grounds of 'grave professional misconduct' and applies to blacklisting. With the inclusion of this provision to the PPA,[83] the rule was perhaps expected to become a significant anti-corruption measure which would lead to a 'purge' of unreliable and corrupt contractors. No such outcome has been observed. The rule remained completely otiose, with no accompanying administrative criminal rule to support it, and without any clearly prescribed action by the contracting authority to eliminate ineligible, as the European legal framework demands.

(b) *Amendments to concluded procurement contracts*

The PPA introduces a general prohibition of amendment of a public procurement contract.[84] Amendments are possible, on 'an exceptional basis', in the express cases listed in the PPA,[85] which, beyond the specific cases of change of state-regulated prices and changes in legislation, require the presence of 'unforeseen circumstance',[86] which does not lead to an increase in the contract value.[87] The term 'unforeseen circumstance' is not contained in Directive 2004/18/EC. The directive does indeed use a similar

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83 Amendment of PPA – SG 94/2008, effective as of 1.1.2009.

84 PPA, Art. 43(1).

85 PPA, Art. 43(2).

86 According to the definition provided by PPA, § 1, it. 14b, 'unforeseen circumstances' are circumstances which have occurred after conclusion of the contract and are not the result of action or inaction of the parties, which could not have been foreseen even if all due care had been exercised and which render impossible compliance with the terms agreed'.

87 PPA, Art. 43(2), it. 1 permits changes: 'Where, for reasons brought about through unforeseen circumstances (a) the time limits of the contract cannot be complied to, or (b) activities within the subject matter of a procurement of works or service have to be partially replaced, where this is in the interest of the contracting authority and does not lead to an increase of the value of the contract, or (c) full or partial replacement of goods included in the subject matter of a procurement of supplies, including of elements, components or parts thereof, is required, where this is in the interest of the contracting authority, does not lead to an increase of the value of the contract and the replacement goods comply with the requirements of the technical specifications and possess technical advantages and/or better functional characteristics as compared to the replaced goods, or (d) the total value of the contract has to be reduced in the interest of the contracting authority owing to a reduction of the agreed prices or of agreed quantities or abandonment of activities'.

term – 'unforeseeable events'[88] but this term is used not in the context of regulating amendments to public procurement contracts but only to define the limited cases in which the award of an (additional) public procurement is possible without prior notice. The PPA restricts contract amendment through the criterion of unforeseeableness solely to awards without prior notice. This limitation of the options available to contracting parties to amend the contract is intended to thwart attempts to restrict competition in the sector and to prevent corrupt practices associated with procurement contract changes. In fact, against the background of inefficient ex post control on contract implementation (as will be discussed in the following chapters), these restrictions on the freedom to negotiate (in addition to deviating from the objective of European law) create purely practical obstacles to procurement implementation[89] and open corruption loopholes in the cases where the amendment cannot be formulated in accordance with the PPA.[90]

(c) *Body governed by public law*

This is analysed in more detail in the following chapter, but the concept is ineptly transposed, expanding the circle of contracting authorities. This opens up a corruption niche for certain companies (e.g.

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88 PPA, Art. 31(c) of PPA.

89 This issue is especially relevant in procurements of works because as a rule the construction process is an extended activity accompanied by numerous risks which may affect project implementation, and frequently involves different interventions and legal relations. The disparate facts and circumstances which can necessitate modification of certain portions of the works contract with view of its adequate implementation go far beyond the definition for 'unforeseeable circumstances', as set out by the PPA, and, respectively, beyond admissible changes in contract.

90 What is more, the recent amendments to PPA of 2014 (SG 40/13.5.2014) which initiated partially the transposition of the New Procurement Directives, had the option of reflecting the provisions of Directive 2014/24/EU, PPA, Art. 43, but the legislator chose not to introduce a change in this direction. The provisions of Art. 43 codify the decision of the *Pressetext* case - C-454/06 *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [1998] ECR I-4401. According to this decision, material amendments to the contract are not admissible because they constitute a new award of a public contract and should be the subject of a new public procurement. An amendment to a public contract may be regarded as 'material' when: a) it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted, or would have allowed for the acceptance of a tender other than the one initially accepted, b) it extends the scope of the contract considerably to encompass services not initially covered, c) it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract. ECJ rules that amendments to provisions of a public contract are admissible when they are not material.

some healthcare institutions) which are forced to apply the cumbersome PPA rules and are denied the option for direct negotiation. Given that Directive 24/2014 also fails to offer a better and different solution to the already disputable definition of a 'body governed by public law',[91] this issue will remain unresolved in the Bulgarian PPA unless the adoption of the new legal framework introduces a cardinal change;

(d) *Centralized public procurement body*

As early as 2006, with the transposition of the Procurement Directives, the Bulgarian legislator provided the option for contract award via a central public procurement body. In recent years European practice has demonstrated that such an 'intermediate' body, in addition to facilitating and unifying the award process, is also a rather successful anti-corruption model. What is more, the New Procurement Directives significantly expand its functions and scope of application. In Bulgaria, however, this body was introduced purely formally; it has almost no activity and plays even less of a role in the fight against corruption in the sector.

The New Procurement Directives highlight the issue of corruption in public procurement as a priority of the new procurement package. The logical expectation is that Bulgarian legislation and the regulations that will be created by the transposition of the EU rules will only create the illusion of structuring the anti-corruption objectives of legislature in a better manner, without actually improving the procedures themselves. It may be hoped that something will happen in practice, but such hope may well be forlorn.

8. CONCLUDING OBSERVATIONS

This chapter aims to present an overview of the origin and development of corruption worldwide and focuses on Bulgaria by outlining the main specifics of corruption in public procurement at national level. Examples are adduced of completely imprudent legislative

[91] See comments in the next chapter of this research.

decisions, ostensibly introduced for the purpose of fighting corruption, but existing only *pro forma*, without achieving any success in that direction.

While corruption has its international dimensions, it also has its individual cause-and-effect aspects in respect of each and every state. It is important to bear this in mind in the analysis of Bulgarian legislation in the field of public procurement, in the assessment of any anti-corruption policies so far pursued, and, finally, in considering comparisons with best practices in other European countries in order to achieve maximum objectivity in the evaluation of possible positive developments in the system.

In its next chapters the study will focus on the specifics of public procurement in Bulgaria, on particular manifestations of corruption in public procurement, and the attempts made so far to combat corruption. The conclusions drawn will, in all cases, relate to the points discussed so far and support the link between legal aspects and the historical, purely national, background to corruption.

Chapter 3

THE PUBLIC PROCUREMENT SYSTEM IN BULGARIA: AUTHORITIES. PARTICIPANTS. CONTROL

'Our aim is to get results cheaper,
sooner, and better through application
of common sense to tough problems…
Keep It Simple, Stupid—KISS—is our
constant reminder.'

Eng. Clarence Leonard (Kelly) Johnson

Given that the objective of this study is to demonstrate that transparency is not, on its own, an efficient method against corruption in public procurement, this chapter aims is to build a bridge between that principle and the participants in the award process in Bulgarian procurement. The following chapters will analyse the main types of corruption observed in the process of public procurement in Bulgaria and the gaps and disadvantages in legislation that contribute to the abundance of corruption in that area. Therefore, it would be appropriate first of all to examine the Bulgarian system, looking at the contracting authorities, the bidders and the institutions involved in the process. This approach would help outline those characteristics of the Bulgarian procurement legislation which differ from or supplement EU legislation, thus leaving to one side most of the provisions which merely transpose the Procurement Directives.

The discussion is based on current primary legislation, the PPA[1] and relevant secondary legislation.

This chapter focuses on control and supervision of the procedures, laid down in Bulgarian legislation, and will demonstrate that none of the current controlling and appellate authorities is, in reality, able to prevent or sanction corruption in an effective way, in complete contrast to the apparent legal transparency of the award process.

Further, all participants in the procurement process are carefully examined so as to render them recognisable and perceivable as possible contributors to corrupt practices and to distinguish their different levels of accountability. When attempting to differentiate between the 'actors' in corruption, it should be noted that '[c]orruption may be the act of a single person operating in his or her personal interest. Employees, representatives or associates, as well as intermediaries or agents, may engage in corruption practices without the knowledge or approval of the project owner or the company for which they carry out a task.'[2]

1. THE PARTICIPANTS

1.1. CONTRACTING AUTHORITIES

The PPA does not provide a definition of the term 'contracting authority', but rather enumerates the possible authorities.[3] The legal definition of 'contracting authority', as provided by Directive 2004/18/EC,[4] is as follows:

> 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such

[1] Promulgated SG 28/6.4.2004, as amended.

[2] Ehlermann-Cache, N. (2007). *Bribery in public procurement*. Paris: OECD, ch. 4, p. 37.

[3] PPA, Art. 7.

[4] Directive 2004/18/EC, Art. 1(9).

bodies governed by public law.'[5]

The PPA provides a relatively comprehensive list of Bulgarian contracting authorities. In accordance with the approach of EU legislature, a distinction can be drawn between contracting authorities in the classic public sector and contracting entities (which may or may not be authorities) in the utilities. The main obligation of contracting authorities is 'to conduct a public procurement award procedure, where the grounds provided for in the law exist.'[6] Further, in order to facilitate the procurement process, contracting authorities may organise and conduct public procurement award procedures by authorizing particular officials to act on their behalf (with appropriate anti-splitting rules), or, two or more than two contracting authorities may conduct a joint procedure.

The 2012 amendments to the PPA[7] provide the option for the establishment of a central purchasing body (CPB) through which procedures can be conducted and public procurement contracts or framework agreements can be concluded for the needs of the executive power. This body may be created by the Council of Ministers acting on proposal of the Minister of Economy and Energy. The purpose of this body is to achieve efficient spending of budget funds and to achieve the highest possible quality in return for the best possible price. The need for such an authority (in conformity with Article 1(10) of Directive 2004/18/EC)[8] was discussed as early as 2006, in the Explanatory Memorandum relating to the proposed changes to the PPA. 'This body will be engaged in cases involving highly standardised documents for the procurement of services and frequently supplied goods, goods of high value, and also in the procurement of works.'[9] The intention was to give

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5 Directive 2014/24/EU, Art. 2(1), item 1 does not make a substantive change in the definition of 'contracting authority'.

6 PPA, Art. 8(1).

7 SG 93/2011, effective as of 26.2.2012.

8 Directive 2004/18/EC, Art. 1(10): 'A 'central purchasing body' is a contracting authority which: — acquires supplies and/or services intended for contracting authorities, or — awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities'.

9 *Explanatory Memorandum to the Draft Bill on the Amendment and Supplement of the Public Procurement Act No 602–01-8 of 20.2.2006*, 40th National Assembly, p. 2.

the Council of Ministers the opportunity to create another contracting authority responsible for the effective distribution of funds and also to meet the requirements of EU law to ensure more transparent and less corruptive procedures. The functions and responsibilities of this authority were not defined in the PPA. The first (and only) CPB was created in February 2010, when the Minister of Finance was appointed to act as the CPB. In its first two years of operation, the CPB had no functions whatsoever; in 2012 the PPA was supplemented so as to clarify that contracting authorities could receive supplies or services from or through the CPB. Thus contracting authorities are able (for deliveries and services) to avoid the complicated PPA procurement procedures and to contract with the CPB instead. However, this option remains rather vague and is used only by the Ministry of Finance for everyday deliveries such as different types of office supplies and fuel, building maintenance and purchasing of plane tickets.[10] In fact, the initial idea of using CPB to award contracts and to facilitate transparency has resulted in a somewhat trivial body, the need for which is rather questionable.

The advantage of this type of award body is all the more obvious given that the New Procurement Directives have increased the functions and scope of activity of these bodies,[11] which is a clear encouragement as to their application and introduction. Evidently, the PPA will have to expand the legal options regulating the functions of central purchasing bodies,[12] but it is still too early to speculate whether these provisions will once again remain a purely palliative reconstruction of award rules or will have an actual practical and anti-corruption effect.

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[10] Art. 3, para 1 of *Decree No 112 of the Council of Ministers*, dated 4.6.2010.

[11] Directive 2014/24/EU, Art. 2(14), (15) § (16) and Art. 37. In addition to the interim figure of the 'central purchasing body' providing centralized purchasing activities and, possibly, ancillary purchasing activities for contracting authorities, the new rules define the figure of the 'procurement service provider'. The latter is a public or private body offering ancillary purchasing activities on the market.

[12] A not so significant amendment to PPA, Art. 8a was received with the 2014 amendments, SG 40/13.5.2014, effective as of 1.7.2014, namely the specification that: 'The central public procurement body shall have the rights and obligations of contracting authority regarding the conduct of procedures and the conclusion and implementation of contracts or framework agreements for the needs of other contracting authorities'.

Classical (public sector) contracting authorities are typically public authorities which allocate mainly budget funds. These include the bodies of state authority, the President, the Bulgarian National Bank, as well as other institutions of State, established by a statutory instrument; bodies governed by public law and all other bodies and/or combinations of bodies possible under Directive 2004/18/EC.[13] Although the enumeration in PPA fully corresponds to the said directive, it should be noted that the interpretation of the provisions of PPA shows that classical contracting authorities are only the bodies of state power and not their subsidiary authorities, which do not have legislative independence.[14]

The definition of bodies governed by public law is not entirely satisfactory even at European level.[15] The PPA is a poor transposition of the definition of 'body governed by public law', set out in Article 1(9) of Directive 2004/18/EC, as the following table shows:

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[13] The most common sub-classification of central and regional classic contracting authorities under Bulgarian legislation is that made by Krivachka in Krivachka, M., Markov, M., Dimova, E. and Lilyan, Z. (2008). *The new aspects in the Public Procurement Act*. IK Trud i Pravo, p. 54 *et seq*.: (i) The central classical contracting authorities are, among others, the National Assembly, NAO, the President, the Bulgarian Ombudsman, the Constitutional court, the CM, the whole ministerial apparatus, executive directors of state executive agencies, representatives of the judicial power, and the Bulgarian National Bank; (ii) territorial classical contracting authorities are primarily all municipalities and their mayors, as well as the municipal manager. In the case of this second group of classical contracting authorities noted under (iii), the legislator has made an exception to the general approach in the PPA of recognizing only separate legal entities as contracting authorities. According to Krivachka this was made for practical reasons – if only *e.g.*, the Minister of Foreign Affairs had been made a contracting authority, he/she would have been obliged to authorize each diplomatic mission and/or consular post separately to conduct a procurement. Krivachka's explanation appears erroneous; the legislator could legitimately prefer to limit the number of contracting authorities rather than increase it.

[14] Prior to the 2006 amendments to the PPA (SG 37/5.5.2006) classical contracting authorities were deemed to be not the state authorities themselves, as defined in the Procurement Directives, but their administrations. Following transposition of the European procurement package, the new concept regarding the nature of contracting authorities was also adopted. Consequently the administration of the President, for example, is no longer a contracting authority; such, instead, is the President him/herself.

[15] Directive 2004/18/EC, Art. 1(9); Directive 2014/24/EU, Art. 2(4) remains more or less the same. As Medeiros comments, despite the attempts at clarifying and structuring the definition of a 'body governed by public law': 'The truth, however, is that the final version of the Directive 2014/24/EU ended up dropping all these changes/amendments, registering a true return to the initial state. As such, the definition of what is a body governed by public law does not suffer relevant changes'- Tavares, L., Medeiros, R. and Coelho, D. (2014). *The new Directive 2014/24/EU on Public Procurement*. Lisbon: OPET, ch. 2 (The New Directive 2014/24/EU on Public Procurement: A First Overview), p. 34.

Directive 2004/18/EC, Article 1(9) – definition of a 'body governed by public law' (presented in its original text, emphasis added)	**PPA, §1, item 21 – definition of a 'body governed by public law'** (presented in English translation and emphasis added)
Anybody established for the specific purpose of meeting needs in the general interest, *not having an industrial or commercial character*; having legal personality; *and*	Any legal entity which, *regardless of its commercial or industrial character*, is established for the specific purpose of meeting needs in the public interest and which fulfils *any of the following conditions*:
financed, for the most part, by the state, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.	(a) more than 50 per cent financed by the State budget, by the budgets of public social insurance or of the National Health Insurance Fund, by the municipal budgets, or by any contracting authorities which are bodies of state power or regional bodies, or are other bodies governed by public law; (b) more than half of the members of the management or supervisory body thereof are appointed by any contracting authorities which are bodies of state power or regional bodies, or are other bodies governed by public law; (c) which is subject to management supervision on the part of any contracting authorities which are bodies of state power or regional bodies, or are other bodies governed by public law.[16]

[16] Management supervision is presumed to exist when an entity can exert, in any way whatsoever, a dominant influence on the activity of another entity. Any medical-treatment facility, which is a commercial corporation and

Two main differences emerge from the comparison of these definitions, which, unfortunately, affect the scope of possible contracting authorities. First, the EU definition sets the limitation that the authority does not have any industrial or commercial character. The Bulgarian version of the definition explicitly emphasizes that the commercial and/or industrial character of the legal entity is of no relevance. As clearly explained by García-Andrade and Athanassiou:

> '[T]he fundamental reason why the Directive excludes from its scope of application bodies engaging in commercial or industrial activities is that to subject them to public procurement procedures would infringe their contractual freedom and, at the same time, undermine their business prospects and deprive them of their operational flexibility.'[17]

The practice of ECJ shows that the commercial/industrial determination of legal entities is often assessed on a case-by-case basis. By analysing the nature of the particular entities, as well as considering the meeting of public interest, the ECJ has pronounced some entities to be contracting authorities despite the fact that they are private commercial entities.[18] However, the PPA leaves no room for assessment and directly stipulates that the Bulgarian public procurement legislation is not interested in the legal status of bodies governed by public law.

The second difference is that the conditions which need to be met by legal entities so that they can be regarded as bodies governed by public law and thus act as contracting authorities are provided strictly cumulatively, whereas the definition in the PPA presents an alternative list of conditions. Thus, if a legal entity meets at least one of the requirements of the definition in the PPA the entity will be considered a body governed by public law and therefore a contracting authority. The difference between the EU and Bulgarian approaches in defining a 'body governed

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more than 30 per cent of the income whereof for the preceding year is for the account of the State budget and/or a municipal budget, and/or the budget of the National Health Insurance Fund, is considered to be a body governed by public law.

17 García-Andrade, J. and Athanassiou, P. (2006). *National central banks and community public sector procurement legislation*. Frankfurt am Main, Germany: European Central Bank, p. 16.

18 Case C-353/96 *Commission v Ireland* [1998] ECR 1998 I-8565.

by public law' is inconsistent with the requirements of EU law: there is clear case-law of the ECJ holding that the conditions are cumulative.[19]

However, Bulgarian courts do not share the above view, arguing that the Bulgarian definition does not run counter to the objectives of Directive 2004/18/EC[20] but merely provides a clearer definition of this type of participant. Due to the indirect effect of Directive 2004/18/EC and the inability of the court to refer to it without taking into account the provisions of the national legislator, and considering the relative freedom provided by Directive 2004/18/EC to national legislations in the transposition of general rules into local legislation, the Bulgarian courts believe that the collision between the two provisions cannot serve as an argument for the exclusion of a group of organisations from the scope of application of the law

Nevertheless, the PPA definition results in an unnecessary expansion of the circle of contracting authorities, which may, perhaps, serve as an excuse for a more thorough look into the activities of certain additional organisations (most often healthcare institutions), but the definition also opens up new corruption gateways in public spending. European legislation has provided a restrictive framework for this group of organisations and any superfluous expansion of the types of contracting authorities falling into that framework, especially when combined with inefficient control, works to the detriment of efforts to limit bribery and cash outflow from the sector.

Utility sector contracting authorities[21] allocate funds received for the public services provided by them, which are explicitly defined by the law. The PPA distinguishes between (i) public undertakings and any combinations thereof, carrying out one or several utility activities (covered under Articles 7a—7e of the PPA) and (ii) merchants and other persons

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[19] See Case C-44/96 *Mannesmann Anlagenbau AG and Others v Strohal Rotationsdruck GmbH* [1998] ECR 1998 I-6821. In para 21 of the judgment ECJ explicitly concludes that '[i]t is clear […] that the three conditions set out therein [in Directive 2004/18/EC, the definition of body governed by public law] are cumulative'.

[20] In this sense see e.g. administrative penal procedure No 3250/15.10.2014 of the Varna District Court chaired by Judge Obreshkova; administrative penal procedure No 54/13.6.2014 chaired by Judge Atanasov; Decision No 258/20.11.2014 of the Administrative Court of Sliven, chaired by Judge Parvanov.

[21] As to EU rules governing procurement by the utilities, see Directive 2004/17/EC.

who are not public undertakings, carrying out one or several utility activities on the basis of special or exclusive rights.

The main difference between the two types is that public companies perform utility activities without the necessity for any specific licensing or permission regime, as these activities are their state obligation. Private entities, on the other hand, may undertake utility activities only after they have been granted 'special or exclusive rights', as determined in the PPA. Utility activities are divided, according to the services provided, into five groups and all utility contracting authorities are specified in compliance with Directive 2004/17/EC.[22]

1.2. BIDDERS

With respect to the determination of candidates and participants in public procurements, the Bulgarian legislator has followed the requirements of the Directives fairly closely. Hence, those of their actions or omissions, which define their relationship with contracting authorities and are conducive to corruption will be addressed later in the course this

[22] (i) *activities relating to natural gas, heat or electricity* - according to PPA, Art. 7a these are in general (without commenting on the envisaged exceptions): 1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of: drinking water, electricity, natural gas or heat, or 2. the supply of natural gas, heat or electricity to such networks;

(ii) *activities relating to drinking water* - according to PPA, Art. 7b these are in general (without commenting on the envisaged exceptions): 1. the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or 2. the supply of drinking water to such networks;

(iii) *activities relating to transport services* - according to PPA, Art. 7c these are the operation of networks, providing a service to the public in the field of transport by railway, tramway, trolley bus or bus, as well as of automated transport systems or cableway. Providing bus transport services to the public, where other parties are free to provide such services under the same conditions as the contracting authority, would not be considered a relevant activity;

(iv) *activities connected with the provision of universal postal services* - according to PPA, Art. 7d these are the services provided for in the Postal Services Act. The persons carrying out these activities should apply the PPA provisions for all the activities thereof;

(v) *activities relating to exploitation of a geographical area* - according to PPA, Art. 7e these are: 1. prospecting or exploring for or extracting oil, natural gas, coal or other solid fuels; 2. the operation of airports, maritime or inland ports or other terminal facilities used for carriage by air, sea or by inland waterway.

work. For this reason, and solely for the sake of completeness of this chapter, it is sufficient to note briefly their most basic characteristics:

(a) Any Bulgarian or foreign natural or legal entity, as well as any combination thereof, may be a candidate or participant in a public procurement procedure.[23]

(b) Where the candidate or participant envisages participation of subcontractors in the contract performance, the requirements apply, in general, also to such subcontractors.

2. AUTHORITIES INVOLVED IN THE PUBLIC PROCUREMENT PROCESS. CONTROLLING AND APPELLATE AUTHORITIES

The authorities involved in the process of assignment of public procurements differ not only in responsibilities and functions, but also in their hierarchical position – from the highest level of state government (*i.e.*, the Council of Ministers and the Minister of Economy, Energy and Tourism) through controlling authorities (*i.e.*, the Public Procurement Agency, National Audit Office and Public Financial Inspection Agency) and down to appellate authorities (*i.e.*, Commission for Protection of Competition, Supreme Administrative court).

2.1. STATE GOVERNANCE AUTHORITIES

Council of Ministers

The Council of Ministers of Bulgaria (*Министерски Съвет*, CM), although not directly involved in the public procurement process, has several significant functions concerning procurements:

[23] *i.e.*, physical entities, traders, legal entities, which are not traders, joint ventures between physical entities and traders, special purpose entities and cooperations of disabled people.

(a) The CM issues all secondary legislation in conformity with the PPA – these include the Regulations for Implementation of the PPA, and the Rules of Organisation of the Public Procurement Agency;

(b) The CM adopts Rules of Operation regulating the activity, structure, organisation of work and staff size of the Public Procurement Agency and approves the annual report of the latter, as presented by the Minister of Economy, Energy and Tourism.

(c) Acting on a motion by the Minister of Economy, Energy and Tourism, the CM may establish a CPPB for the needs of executive authorities.

(d) Another function of the CM linked to the procurement process is the obligation to determine the terms and procedure for implementation of *ex ante* control by the Public Procurement Agency concerning procurements financed by EU funds - a matter which will be discussed below.

The Minister of Economy, Energy and Tourism

Like the CM, the Minister of Economy, Energy and Tourism (*Министър на икономиката, енергетиката и туризма*, MEET) could also act as a contracting authority. However, he/she also has some additional specific managing functions. Article 17 of the PPA stipulates that the MEET 'shall implement the state policy in the sphere of public procurement'. Further the Public Procurement Agency is established as an institution linked to the MEET. The MEET is obliged to present an annual report on the activities of the PPAgency to the CM. In addition, the MEET appoints the executive director of the PPAgency and approves certain documents, such as draft procurement notices, statistical reports, and information for contracting authorities prepared by the PPAgency.

2.2. CONTROLLING AUTHORITIES

The use of different criteria leads to the definition of different types of control over the award of public procurements (as described below).

Despite the differences, almost all of the functions of controlling authorities are related to legality control, *i.e.*, compliance with the regulatory requirements of the PPA and the relevant secondary legislation. Efficiency control, *i.e.*, the monitoring and sanctioning of the effectiveness, efficiency and cost-effectiveness of the procurement (including any corruption actions undertaken) is highly limited and fragmentarily regulated in the procurement legislation. This is one of the characteristics of the legal framework in public procurement which is criticized for creating conditions in which various corruption schemes can avoid censure, regardless of apparent compliance with the legal requirements and maximum transparency in the conduct of awards. Accordingly, the suggested anti-corruption models of most of the organisations working on curbing corruption in public procurement in Bulgaria seek the development of 'a system of risk assessment, and the transfer of the weight from the currently dominant legality control to the control of efficiency and effectiveness.'[24]

Depending on the phase of the public procurement award process under control, control can be divided into *ex ante*, ongoing and *ex post* control.

Ex ante control is exercised at the pre-award phase and, following a recent amendment to the PPA, is concentrated in a single body – the Executive Director of the Public Procurement Agency. The control is directed (i) towards public procurement procedures fully or partially funded by EU resources, above the thresholds, as defined in the PPA,[25] (ii) towards public procurement procedures for works in value equal or higher than European thresholds and (iii) towards decisions to initiate negotiated procedures without prior publication of a contract notice, which are at or

[24] Corruption in public procurement: risks and counteractions. Development of public-private partnership, *Centre for the Study of Democracy*, Csd.bg, (2015). [online] Available at: http://www.csd.bg/artShow.php?id=8621 [Accessed 28.5.2015].

[25] PPA, Art. 19(2), it. 22, amended SG 40/13.5.2014, effective as of 1.7.2014 - 'shall exercise *ex ante* control over public procurement procedures: (a) fully or partially funded by resources of European Union funds, as follows: (aa) for works of a value equal to or greater than BGN 2,640,000 [approx. EUR 1,349,79]; (bb) for supplies or services of a value equal to or greater than the respective value specified in Art. 45c(2) [*i.e., European thresholds*]; (b) for works under Art. 3(1), it. 3, financed with budget resources beyond those listed under 'a' of a value equal to or greater than BGN 9,779,000 [approx. EUR 4,999,874]'.

above national thresholds (except where such procedures are conducted by contracting authorities in the utilities sector).[26] In addition, public procurement procedures funded by EU resources are also subject to control by the Managing Authority of the respective Operational Programme and the Audit of EU Funds Executive Agency.

Ongoing control can *de jure* be exercised at any stage of the public procurement award procedure - from the moment the procedure is launched until completion of the contract – by any public organisation which is a contracting authority under the PPA. Its purpose is to ascertain, in good time, any possible inaccuracies, omissions or irregularities in the conduct of specific procedures; it is therefore considered to be the most comprehensive type of control, covering both the legality of the procedures and also the effectiveness of implementation. Ongoing control may identify infringements of such gravity that may force the contracting authority to go so far as to terminate the procedure.[27] It is carried out in adherence to the principles of publicity and transparency in the various phases of the award procedures and in compliance with the internal regulations adapted by each contracting authority with view of the specific sector and activities.

The functions of internal control[28] are set out by the PPA,[29] the Financial Management and Control in the Public Sector Act (*Закон за*

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[26] PPA, Art. 19(2), it. 24, amended SG 40/13.5.2014, effective as of 1.7.2014 – 'exercise *ex ante* control over decisions to initiate negotiated procedures without publication of a contract notice pursuant to Art. 90(1), it. 3 - 9 and it. 12, where all of the following conditions are met at the same time: (a) the decisions are issued by contracting authorities pursuant to Art. 7, it. 1-4; (b) the procurements are in the value indicated under Art. 14(1)'.

[27] Pursuant to PPA, Art. 39(1), it. 6.

[28] Which should cover *ex ante*, ongoing and *ex post* control all together.

[29] Until 2011 the PPA did not contain any provisions to allow the contracting authority to control the review, evaluation and ranking of offers by the procurement selection committee. With the 2011 amendments of PPA (SG 93/2011, effective as of 26.2.2012), Art. 36a authorizes the contracting authority to exercise documented substantiated control over the work of the committee covering all their actions. Upon exercising such control, the contracting authority only checks the contents of the memoranda drawn up by the committee as to conformity with the legal requirements and with the terms and conditions of the invitation to tender, as announced in advance. If this check detects any infringements in the work of the committee which can be remedied without resorting to termination of the procedure, the contracting authority must give directions in writing as to how these infringements must be eliminated.

финансовото управление и контрол в публичния сектор)[30] and the Internal Audit in the Public Sector Act (*Закон за вътрешния одит в публичния сектор*).[31] Some authors[32] maintain that internal control objectively has the greatest potential to limit corruption opportunities, due to the fact that these controlling activities include elements of risk management as well. However, they also consider that: '[t]he problem with internal control is that, comparatively speaking, it suffers from the lowest level of independence in comparison to external audit and state inspections and examinations.'[33]

Ex post control is related to the examination of those public procurement award procedures, which have resulted in a contract or a contractor selection decision and were not disputed. The purpose of *ex post* control is to determine (i) whether and to what extent the contracting authority has acted in accordance with legal requirements, (ii) whether or not it has made any omissions or infringements and (iii) whether its conduct has resulted in infringement of the basic principles of public procurement award – publicity and transparency, free and fair competition, and equal treatment of all candidates. *Ex post* control is entrusted to two bodies that are always external to the contracting authority. These are the Bulgarian National Audit Office and the Public Financial Inspection Agency, whose functions are discussed below. Although these two bodies have different functions and different lines of responsibility, they both focus their control powers solely on one of the participants in the public procurement award process – the contracting authority.

The Public Procurement Agency

The Public Procurement Agency (*Агенция по обществени поръчки*, PPAgency) was the first separate administrative structure with relatively clearly defined powers in the public procurement system in Bulgaria. The

[30] Promulgated SG 21/10.3.2006, as amended.

[31] Promulgated SG 27/31.3.2006, as amended.

[32] Pashev, K. and Marinov, K. (2009). *Reducing corruption risks and implementation of good practices by the management of public procurements*. Sofia: Center for the Study of Democracy, p. 20.

[33] *Ibid.*

law establishing the Agency responded to a specific condition for the country's accession to the European Union. The implementation of a sustainable policy in the field of public procurement and the fulfilment of the commitments for harmonisation of legislative acts required the establishment of a separate administrative body to be responsible for these goals.

The PPAgency assists the MEET in the implementation of state policy in the field of public procurement. It is a legal entity with headquarters in the capital city of Bulgaria - Sofia. The PPAgency is entirely financed by the state budget, it does not generate its own revenue and all of its services are provided free of charge. The administration is managed and represented by an Executive Director appointed by the MEET, after consultation with the Prime Minister.

The responsibilities and functions of the PPAgency are aimed at ensuring the legality of public procurement award, the application of the horizontal policies of the EU, efficient use of public funds, including those from European funds as well as adherence to the principles of publicity, transparency and loyal competition. The PPAgency is responsible for the preparation of various draft regulations and develops methodologies that facilitate participants and candidates in the procedures. The main functions of the Executive Director of the PPAgency are set out in Article 19, para 2 of PPA and are spelled out in detail in secondary legislation.

Generally, the functions of the PPAgency's Executive Director can be classified as follows (part of the information collected by the executive director in implementation of his/her functions is publicly accessible on the official website of the PPA).[34]

(a) *methodical functions* - issues methodological guidance aimed at consolidation of practices in the application of the PPA and of the relevant secondary legislation; draws up drafts of statutory instruments and standard forms of documents for publication of information in the Bulgaria Public Procurement Register and gives opinions on international treaties in the sphere of public procurement *etc.*

[34] Aop.bg, (2015). [online] Available at: http://www.aop.bg [Accessed 28.05.2015].

(b) *cooperative functions* – pursues cooperation with other authorities, branch organisations as well as with organisations in other countries in the field of public procurement; encourages good practices in the award of public procurements, including such related to the application of environmental, social and innovative requirements *etc.*

(c) *informative functions* – provides summarized information from the Public Procurement Register through the internet site of the PPAgency and transmits annual statistical reports to the EU Commission as well as the enforceable rulings of the Commission for Protection of Competition; notifies the EU Commission of any difficulties, in law or in fact, encountered in connection with participation of Bulgarian entities in public procurement award procedures for services in third countries *etc.*

(d) *assistance* - maintains the Public Procurement Register, maintains a list of contracting authorities and (with the assistance of the professional associations and organisations in the relevant sector) a list of persons whom contracting authorities recruit as external experts in the preparation and conduct of public procurement award procedures; assists in the process of public procurement award by electronic means *etc.*

(e) *control and sanctioning functions* – supervises the competent authorities so as to exercise control on compliance with the PPA; lodges appeals to the Commission on Protection of Competition against decisions of contracting authorities, as identified by the EU Commission prior to contract conclusion; maintains a list of persons who have defaulted on public procurement contracts, as ascertained by an effective court judgment,[35] and participates in *ex ante* control

[35] This function appears to be completely deprived of any practical purpose; moreover, there are no clearly formulated imperative or sanction norms in that direction. With regards to this provision, the present author noted as follows in her article Georgieva, I. (2008) The New Amendments to the Public Procurement Act, *Sofia: Construction Business Magazine*, issue 22/21.11.2008: 'A newly-introduced responsibility of the Executive Director is to maintain 'blacklists' of contractors, which is currently a hot topic of debate. Information on entities which have defaulted on public procurement contracts […] will, however, be made public independent of this responsibility. Apparently, the ambition of the legislator is for these lists to contain up-to-date data which may help prevent short-sighted choices of contractors. Although the general intent of this new provision is undoubtedly positive, so far it merely serves to denounce and castigate. The legislator does not, in fact, require from contracting authorities to repudiate offers from

over public procurement awards, as noted above.

The functions of the PPAgency Executive Director relate mainly to the development of legislation, providing support to public procurement participants and promoting good practices, exercising *ex ante* control on legislation enforcement, maintaining the Public Procurement Register and information monitoring. The one function on which the Executive Director should concentrate most of his/her efforts in order to contribute to the limitation of violations and corruption schemes in the field of public procurement is *ex ante* control on the procedures. However, this function has been considerably limited.

At EU level, Council Recommendation on Bulgaria's 2013 national reform programme and delivering a Council opinion on Bulgaria's convergence programme for 2012-2016[36] stated in paragraph 15 of the preamble:

> 'Effective implementation of EU funds remains critical to necessary public investment. The 2011 reform of public-procurement legislation was a significant step towards improving the monitoring, prevention and punishment of irregularities. While new rules covering *inter alia* EU co-funded projects have entered into force,[37] giving broader powers to the Public Procurement Agency would further enhance the effectiveness of *ex ante* control.'

It is precisely with view of these EU recommendations that some of the amendments[38] to the PPA were introduced in 2014,[39] whereby the

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candidates on […] the list. On the other hand, no legal basis has been provided as to how entities could be removed from the 'disgrace' list. This measure might also lead to an increase in the number of registrations of 'new' contractors in the Commercial Register. Evidently, the aim is to combat corruption, judging from its introduction after the latest criticism by the EU in this respect, but its implementation is altogether pointless'.

36 *Recommendation for a Council Recommendation on Bulgaria's 2013 national reform programme and delivering a Council opinion on Bulgaria's convergence programme for 2012-2016.* Document COM (2013) 352.

37 In 2012.

38 In the *Explanatory Memorandum for the draft Bill amending and supplementing the Public Procurement Act 2013*, Section IV, par. 1, item 1.1., Government.bg, (2015). *www.government.bg.* [online] Available at: http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0211&n=73&g [Accessed 28.5.2015], the will of the legislator to implement the recommendations of *Council Recommendation on Bulgaria's 2013 national reform*

Executive Director of the PPAgency is empowered to undertake *ex ante* control of public procurement procedures for works of a value equal to or higher than European thresholds. Before that amendment, the powers of the Executive Director to implement *ex ante* legality control over contracting authorities' actions were focused only on public procurement procedures funded by EU resources, above the thresholds[40] and on the decisions of contracting authorities to initiate negotiated procedures without prior publication of contract notice.

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programme and delivering a Council opinion on Bulgaria's convergence programme for 2012-2016 has been explicitly stated.

39 SG 40/13.5.2014, effective as of 1.7.2014 and 1.10.2014, respectively.

40 In addition to this *ex ante* control over the spending of European funds, control (*ex ante* and *ex post*) is carried out by the Managing Authorities of each Operational Programme (for Bulgaria these are: 'Transport', 'Environment', 'Regional Development', 'Competitiveness', 'Technical Assistance', 'Human Resources Development', 'Administrative Capacity') as well as the audits performed by the Audit of EU Funds Executive Agency.

Managing authorities exercise *ex post* control over all procedures implemented by beneficiaries. Where mandatory *ex ante* control is exercised by the PPAgency, the MA performs *ex post* control by comparing the statement of compliance with the PPA and the final report of the PPAgency and more particularly the part regarding whether the instructions given as per *ex ante* control have been taken into account. In addition, the activity of Managing Authorities is assisted and controlled by the Audit of EU Funds Executive Agency in its capacity of responsible body for specific audit activities for EU funds and programmes in accordance with international agreements for the provision of funds from the EU and the respective EU regulations on the management and control of contributions by the Structural Funds, the Cohesion Fund and the EU pre-accession funds. The Audit of EU Funds Executive Agency is appointed to act as an Audit authority and Compliance Assessment Authority for the management and control systems of all operational programmes co-funded by the European Regional Development Fund, the European Social Fund and the Cohesion Fund. Given that these additional control activities are performed by those two independent bodies on the basis of direct implementation of *Council Regulation (EC) No 1083/2006* of 11.7.2006 laying down general provisions on the (i) *European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999*; (ii) *Commission Regulation (EC) No 1828/2006* of 8.12.2006 setting out rules for the implementation of *Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund* and of (iii) *Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund*; as well as other EC regulations dedicated to the different programmes, their activity is of no particular interest for this research as it is not the product of national legislation. The next chapters discuss some useful reports prepared by those authorities, which highlight the most frequent violations in public procurement. It is worth noting, however, that the control exercised by those authorities is solely control over the legality of contracting authority acts, while the efficiency of public spending remains outside their scope. Hence it is quite possible, in practice, to encounter (and, according to individuals working in the field, this happens quite often) public procurements which are under the control of all possible control bodies pursuant to national and European legislation, where formal technical errors in the conduct of the procedures have been detected and penalized via financial corrections, but corruption schemes nevertheless remain 'elusive'.

Admittedly, the legislator was right to include *ex ante* control for works of higher value because they tend to be among the most tempting of procurements in the entire EU and are a frequent target of corruption attacks. The extension of *ex ante* control in this case could be a positive step towards eliminating corrupt intentions of contracting authorities in embryo, although it cannot be concluded that the functions of *ex ante* control have been significantly expanded. But how this control will be implemented can only be revealed by practice. Another question is how efficient this could be, given that it will only be based on documentary content in very specific cases, as set out by PPA.[41] [42] The Executive Director of the Agency will, from now on, have the obligation of monitoring the motives for formulation of selection criteria and their compliance with the requirements for non-discrimination and proportionality. Given the attempts for anti-corruption measures introduced by the legislator with the latest amendments, it is definitely a good idea to delegate, to at least to some of the control bodies, the task to ensure that the procurement documents do not contain discriminatory criteria.

The PPA and the Regulations on its application[43] however, fail to provide a clear view as to how such control is to be carried out or how meaningful it can be expected to be.[44]

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41 *i.e.*, according to PPA, Art. 20a – 1. the contract notice; 2. the decision to initiate a restricted procedure where reasons of extreme urgency exist as a result of which the deadline fixed for receipt of applications to qualify cannot be complied with; a negotiated procedure with publication of a contract notice or a competitive dialogue procedure; 3. the method of evaluation of the tenders, where the criterion of the most economically advantageous tender applies; 4. the motives for the selection criteria indicated and compliance of such criteria with the requirements for non-discrimination and respect of the proportionality principle.

42 In this sense see also Ognyanova, P. (2012). *Current changes in public procurement awarding*, Sofia: Helikon, ch. IX, pp. 269-270.

43 Regulation on the implementation of the Public Procurement Act (*Правилник за прилагане на закона за обществените поръчки*, effective as of 1.7.2006, as amended).

44 As will be seen in the following chapters of the research, one of the least detectable corruption schemes involves precisely the use of highly specific technical criteria and requirements which are intelligible only for experts in the very narrow field of the procurement.

National Audit Office and Public Financial Inspection Agency

The National Audit Office[45] (*Сметна палата*, NAO), together with the Public Financial Inspection Agency[46] (*Агенция за държавна финансова инспекция*, PFIA), are the bodies to which PPA entrusts the implementation of *ex post* control in the field of public procurement. Control by the NAO concerns contracting authorities falling within the scope of the National Audit Office Act (*Закон за сметната палата*, ANAO)[47] [48] (in general, these are classical contracting authorities). Such control covers procedures which have already ended in a contract or termination decision, completed contracts and, as of July 2014 – the implementation of procurement contracts (although control over performance quality is explicitly excluded) and thus is, in most cases, *ex*

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[45] Independent organisation, accountable to the National Assembly (*i.e.*, the Parliament).

[46] Authority of the executive power (accountable to the Minister of Finance).

[47] Promulgated SG 12/12.2.2015, as amended.

[48] ANAO, Art. 6 - '(1) The National Audit Office shall audit: 1. the state budget; 2. the budget of the state social security scheme; 3. the budget of the National Health Insurance Fund; 4. the budgets of municipalities; 5. other budgets adopted by the National Assembly. (2) The National Audit Office shall audit also: 1. the budgets of spenders of budget appropriations under the budgets referred to in paragraph (1) and the management of their property; 2. the budgets of budget organisations under Art. 13(3) & (4) of the Law on public finances; 3. budgetary resources granted to persons engaged in business; 4. accounts for funds from the European Union and other international programs and contracts under Art. 8(2) & (4) of the Law on Public Finance, including the management thereof by the relevant authorities and final beneficiaries; 5. The budget expenditures of the Bulgarian National Bank and their management; 6. The formulation of any annual surplus of income of expenditures of the Bulgarian National Bank that is payable to the state budget, and any other dealings of the Bank with the state budget; 7. The generation and management of government debt, government-secured debt, municipal debt and the use of debt instruments; 8. privatisation and concession of state and municipal property and of public resources and public assets provided to individuals outside the public sector; 9. The performance under international agreements, treaties, conventions or other international instruments, where so provided for in the respective international instrument or assigned by an empowered authority; 10. Other public resources and activities, where so assigned by law. (3) The National Audit Office shall audit: 1. state-owned enterprises falling within the scope of Art. 62(3) of the Commercial Act; 2. commercial undertakings with more than 50 per cent state and/or municipal interest in capital; 3. legal entities that have obligations guaranteed by the state, or obligations guaranteed with state and/or municipal property. (4) The National Audit Office audits the management and disposition of public assets and liabilities regardless of the reason for this management and disposition and the status of those who carry it out. (5) The National Audit Office produces reports with opinions on the implementation of the state budget, the budget of the state social security, the budget of the National Health Fund and the budgetary costs of the Bulgarian National Bank which it then submits to the National Assembly. 6) The National Audit Office may also audit the foreign funds accounts of budget organisations'.

post.[49] However, the scope of control by NAO includes matters of effectiveness and cost-efficiency of conducted procurements,[50] which is a huge advantage over the narrower control exercised by PFIA. In fact, the NAO audit is the only type (compared to all other types of external institutional control) which goes beyond issues of legality (*i.e.*, conformity with legal rules). Pashev notes, moreover, that:

> '[T]he control functions of the NAO cover such crucial anti-corruption pieces of legislation as the Law on Prevention and Detection of Conflicts of Interests, the Law on Party finances and the Law on Disclosure of Assets of High-Rank State Officials. These are important safeguards against abuse of contract-awarding power, which aim at weakening the sources of corruption in the political system.'[51]

The PFIA exercises *ex post* control over the actions of contracting authorities which fall within the scope of the Public Financial Inspection Act (*Закон за държавната финансова инспекция*, APFIA).[52] [53] Its

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[49] By way of exception, ongoing control is regulated in ANAO, Art. 44: Where, in the course of the audit, it has been found that certain actions result in opportunities for legal irregularities in collecting or spending budgetary or other public funds, and for damaging the property of the auditee, the head of the respective department or the regional division director shall, upon a proposal by the head of the audit team, notify the relevant competent authority so that measures can be taken to discontinue such actions.

[50] ANAO, §1, item 4 - 'Performance audit' shall refer to an inspection of activities involved in the planning, implementation and control at all management levels of the auditee to ensure their effectiveness, efficiency and economy, where (a) 'effectiveness' is the achievement of the objectives of the auditee when comparing the actual and expected results of its operations; (b) 'efficiency' is the achievement of maximum results from available resources in the activities of the auditee; (c) 'economy' is the acquisition, at the lowest possible cost, of the resources required for the activity of the audited entity in compliance with the quality requirements to such resources'.

[51] Pashev, K. (2009). *Reducing Corruption Risks and Practices in Public Procurement: Evidence from Bulgaria*, Paper presented at the First Global Dialogue on Ethical and Effective Governance (Amsterdam), p. 21.

[52] Promulgated SG 33/21.4.2006, as amended.

[53] APFIA, Art. 4 – 'Public financial inspections shall be performed in: 1. budget organisations; 2 state enterprises […], as well as municipal enterprises; 3. commercial companies with blocking quota of state or municipal share in the capital; 4. commercial companies, in whose capital the blocking quota belongs to an entity on item 2 or 3; 5. legal entities, having liabilities guaranteed with state or municipal property; 6. legal entities under the Non-Profit Entities Act and the non-personified partnerships under the Obligations and Contracts Act, where the state or municipalities participate directly or indirectly in their property; 7. state aid beneficiaries, entities financed with funds from the central government budget or municipal budgets, under international agreements or under European Union

control functions cover not only classical contracting authorities but also those in the utilities sector. Control exercised by PFIA is limited to the legality of the public procurement. Nevertheless, it is more targeted from the standpoint of detection of corruption in public procurement due to the fact that it is based *inter alia* on signals from state authorities, individuals and legal entities.

A significant difference between the two types of *ex post* control performed by NAO and PFIA is that NAO's control covers, in all cases, a particular period of time (the 'audited period'), while PFIA inspects specific procedures, contracts or costs incurred for the particular type of public procurement, expressly specified in the financial inspection order. This means that control exercised by PFIA has a better chance of detecting infringements in public procurement procedures on time.

PFIA control activities may be initiated (i) upon receipt of requests, complaints or alerts for violations of the budget, financial, economic or accounting activities of the organisations and entities audited by PFIA and submitted by state authorities, natural persons and legal entities; (ii) upon request by the PPAgency or NAO; (iii) for the purpose of monitoring the utilization of state aid and the spending of target subsidies provided under the State Budget Act for the respective year and decrees issued by the Council of Ministers; (iv) upon request by the Council of Ministers or the Minister of Finance and (v) upon assignment by the Prosecutor's Office and upon alerts for irregularities, affecting the financial interests of the EU, established by the Ministry of Interior.[54] In addition to the above options, financial inspection of the award and implementation activities in public procurement can also be carried out, from time to time, on the basis of an approved annual plan which is mandatory for the Agency.[55]

Unlike the PFIA, which may, in addition to planned inspections, perform inspections when alerted, NAO may only audit organisations on the basis of the adopted annual programme of its audit activities. The

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programmes, as well as the entities funded by state-owned enterprises [...] - as regards the spending of such funds'. Control over other contracting authorities which do not fall under Art. 4 is implemented through inspections'.

[54] Through the directorate 'Protection of the financial interests of the European Union'.

[55] APFIA, Art. 5(1) & (2).

National Assembly may also issue decisions assigning the National Audit Office to carry out up to 5 extra audits per year, in addition to those included in the annual programme.[56] Bearing in mind that NAO is the only controlling body in public procurement which is relatively independent and not placed under the umbrella of the executive power and is also the only body monitoring the appropriateness of procedures, the lack of options to alert this body upon request by individual natural persons and organisations is a serious drawback to its ability to fight organised corruption in the award process.

A distinction between the two bodies of *ex post* control in the field of public procurement can also be made on the basis of the type of control they apply to contracting authorities. Under the ANAO, the only form of control applied to entities inspected by NAO is an *external audit*. Control carried out by NAO authorities not infrequently results in the detection of inaccuracies, weaknesses and even infringements of regulatory requirements in the field of public procurement. In 2011 a particular cooperation agreement between the CPC, NAO and PFIA was signed, one of the objectives being 'to facilitate the implementation of control in the field of public procurement and to create conditions for the detection and prevention of violations [...] in the form of the so-called 'tender manipulations'.[57]

PFIA auditors verify compliance with PPA by means of *financial inspections* of the contracting authorities covered by APFIA (the classical contracting authorities). On the other hand, compliance with the PPA on behalf of entities which are not subject to financial inspection (the utilities) is controlled by the PFIA by means of *examinations*.[58] The PFIA

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[56] ANAO, Art. 7(1).

[57] Cooperation agreement between the National Audit Office of the Republic of Bulgaria, the Commission for Protection of Competition and the Public Financial Inspection Agency of 27.4.2011.

[58] A different (from financial inspections) form of control, stipulated by the Public Financial Inspection Act. In carrying out examinations the bodies of PFIA are entitled to free access to the inspected entity. They can check the whole documentation related to the public procurement award and to activities requiring the award of public contracts. PFIA bodies have the powers to search premises, vehicles and other places, (where records of the inspected entity are kept), and to seize documents, records of computer data and carriers thereof to provide evidence. In the carrying out of these actions assistance of the Ministry of Interior may be requested. The individuals in the

controlling bodies compile a report on the results of the *financial inspection* containing all relevant findings supported by evidence. The report is delivered to the contracting authority and presented to the body which requested the inspection. Depending on the results of the inspection, the Director of PFIA, or, as the case may be, the officials authorized by him, are entitled to: (i) give written instructions for the suspension of violations and for elimination of the harmful consequences thereof; (ii) make proposals to the competent authorities to stop the actions that lead to the commission of an offence or the causing of damage; (iii) make proposals to the competent authorities for the annulment of illegal acts; (iv) propose to the competent authorities that property be searched and/or disciplinary action be taken, as appropriate; (v) propose to the Minister of Finance that the transfer of the subsidies allocated for that year be suspended, or that the accounts of the budget organisations be blocked until the infringements are eliminated.[59]

The sections of these reports concerning infringements ascertained in the award procedures are sent to the PPAgency as well;[60] if there are evidences of crime, the materials from the inspection are also sent to the Prosecution office. Infringement reports under PPA are issued by PFIA officials while penalty decrees are issued by the Minister of Finance or officials authorized by him.

As for the consequences of PFIA-detected violations, this institution may, as was discussed above, also act as a penal body which may issue penal orders and impose sanctions.

The current situation of the NAO, however, verges on the absurd. Precisely due to the fact that the Office is the only control body in Bulgaria in a position to act as a significant factor in the fight against corruption, its structure, functions and organisation have suffered repeated and radical changes at legislative level, with two of these changes

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inspected entities are obliged to assist PFIA authorities and provide the necessary documents, information and reports. The failure to do so is fined.

[59] APFIA, Art. 18.

[60] The consequences after violations of the public procurement regime ascertained by the three controlling authorities and the effectiveness of these authorities will be discussed further in this research, since they are closely related to the corruption topic.

occurring in less than a year. Thus the NAO has been reduced to an object of political games and revanchism for each new government and is currently unable to function because it is paralysed by the constant ambiguity concerning its rights and authority. Between May 2014 and January 2015 alone, the NAO was successively stripped of, and then restored to its administrative penal functions, was transformed into a collective body and then, conversely, was assigned a chairman and members, and it was assigned to audit small municipalities and divested of these powers if the value of the inspection falls below BGN 10 million (approx. EUR 5,113,148).

Ultimately, the NAO may sanction inspected entities when violations are detected.[61] Whether or not this function, as well as any of the other key responsibilities of the NAO in detecting public spending under corruption pressure will, once again, be pruned down following the next change in power is unclear. The analysis of legislative amendments regulating NAO, however, clearly indicates that the ambition of each new government is to restrict the independence of this body, created *a priori* as an independent corrective, or, at the very list, to severely limit its activity in order to ensure that the NAO will not act as intended and will not detect corruption deals to the inconvenience of the powers that be.

The analysis of the similarities and differences between the two bodies performing *ex post* control on the award process and (as of very recently) on public procurement implementation[62] reveals that PFIA has greater responsibilities, but is limited to the implementation of legality control only (monitoring mainly conformity with procedural rules in the conduct of the procedures). On the other hand, NAO is also entitled to analyse the efficiency and effectiveness of the awards and it would be more proper if it were the more independent body of the two. The NAO, however, does not act on signals. Both institutions currently act on the basis of planned inspections (PFIA may act on signals from natural persons and/or organisations as well) and both have the functions of administrative penal bodies. From this point of view, and bearing in mind

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61 ANAO, Art. 59 and §9; PPA, Art. 127c.

62 Audits and inspections on the implementation of public procurements are, in practice, absent, and thus cannot be an object of analysis within this study.

the economic level of Bulgaria and the limited resources allocated to individual institutions, it can be concluded that it would be much more effective if only a single authority existed, dedicated to *ex post* control over public procurement. Efforts should be concentrated around the NAO, upholding its independence and ensuring a sufficient number of employees with the necessary qualifications instead of experts whose legality control activities in the FPIA and the NAO unfortunately overlap. An independent audit office, combining both legality and efficiency, able to sanction perpetrators and to act on alerts, may become one of the main pillars in the fight against corruption in the sector and may seriously limit attempts to restrict competition and manipulate public spending for personal gain. Unfortunately, European legislation (even the New Procurement Directives) provide significant freedom to the national legislator to choose how and through which institution to carry out *ex post* control over contract award and implementation. Thus, the national legislator has clearly embraced the 'the more, the better' principle, which, in this particular case appears quite inefficient and inadequate to counter corruption in the sector.

The controlling functions of these two authorities, external to the contracting authority, are of particular interest, regardless of their failings. Given the fact that *ex post* control cannot prevent or resolve any shortcomings in the behaviour of the contracting authority, but can only establish and sanction it, the role of the two other types of control over public procurements – *ex ante* and ongoing, the introduction and implementation of which depends largely on the will of contracting authorities – ought to be gradually strengthened. However, the work and reports of NAO and PFIA throughout the years[63] have led to the identification of the most common offences committed by contracting authorities. For this reason, their conclusions, along with those of various other national and international non-governmental organisations, will be used as the basis of this study in subsequent chapters to give a comprehensive classification and examples of infringements of procurement procedures, involving corrupt behaviour.

[63] Not including the activity of NAO in the past two years, since, as has been already discussed, the said body is rather sluggish of late due to being subjected to constant organisational and functional changes.

2.3. APPELLATE AUTHORITIES

The appellate instances dealing with procurement are the Commission for Protection of Competition (at first instance) and the Supreme Administrative Court (at second instance, but the only judicial instance). Their functions, as well as the controversial role of the Commission for Protection of Competition in this process, are detailed below.

Commission for Protection of Competition

As originally created, the Commission for Protection of Competition (*Комисия за защита на конкуренцията*, CPC) is the Bulgarian regulator in the competition sector. It is an independent specialised government authority, empowered to apply competition legislation in Bulgaria, the main purpose of which is to ensure the protection and conditions for the expansion of competition and free commercial initiative. With the 2006 amendments to the PPA, the CPC was elected as the competent administrative authority to decide on claims against the acts of contracting authorities (as a first instance of appeal). Despite the close connection between competition and procurement, the decision of the legislator to grant jurisdiction to a non-judicial authority was criticized for a long period of time as unconstitutional.[64] Under the general administrative rules in Bulgaria, administrative acts issued by administrative bodies can be appealed before a court or before a higher ranking administrative body. CPC is not a higher ranking administrative body than contracting authorities. Given that control over procurement is implemented by the NAO and by PFIA authorities, some authors have argued that '[c]onsidering the fact that the bigger the liability of subjects, the greater their lack of responsibility, we can be certain that the current reform in

[64] According to the Bulgarian Constitution, Art. 119(3): 'Extraordinary courts are prohibited', meaning the existence of any other courts than the Supreme Court of Cassation, the Supreme Administrative Court, appeal, county, military and district courts, as well as any specialized courts established by law, is prohibited.

appeal under PPA will definitely not be the last.'[65]

However, it seems that after almost a decade of established experience, CPC is considered by legislators to have appropriate expertise with public procurement issues and, despite several attempts to transfer appeals to administrative courts, this special authority continues its activity.

In conjunction with transposition of the New Procurement Directive, the opportunity might be taken to transfer first instance appellate jurisdiction to the administrative courts. In any case, such a move would distribute appeals among various district courts, with, perhaps, the somewhat unfortunate result that appeals may be expected to become more burdensome in terms of deadlines for decision-making. However, whether such a change would affect the degree of corruption in the field, as is sometimes argued,[66] is rather doubtful.

The control that CPC currently exercises is control of the legality of contracting authority acts. Efficiency control cannot be carried out by CPC due to the nature of this specific proceeding, which differs from appeal as per the general administrative order.[67] Nevertheless, the scope of control over contracting authorities by CPC is maximized – all actions and inactions of contracting authorities up to conclusion of the public contract (or, as the case may be, a framework agreement) may be appealed. It should be borne in mind that the actions/inactions of the selection committee itself are outside the scope of appeal before the CPC. The selection committee is considered a subsidiary body to the contracting authority; its acts do not constitute individual administrative acts and are therefore not subject to separate appeal.[68]

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65 Markov M., Krivachka, M. (2006). *The new aspects in the Public Procurement Act*, Sofia: IK Trud i Pravo, 2006, p. 275.

66 Opinions of several Supreme Administrative Court judges expressed in oral interviews with the author for the purposes of this research.

67 The only procurement procedures that can be appealed before the general administrative courts and not before the CPC are those connected with the defence and security of the state under Art 296 TFEU.

68 In this sense see Definition No 273 of 2007 of SAC, as well as Kovacheva, A. (2008). *Public Procurements Award*. Sofia: Fenea Publishers, p. 138. However, acts of contracting authorities based on the protocols of the selection committee can be appealed.

With the amendments of February 2012 to PPA,[69] the powers of the PPAgency Executive Director to appeal to the CPC against discriminatory terms and conditions contained in public procurements notifications were repealed[70] and this limitation remains in force after the last amendment of PPA in 2014 as well. This extraordinary change severely limits the PPAgency's ability to enforce *ex ante* control and is certainly detrimental to the anti-corruption policies of the Bulgarian government. Prior to this legislative amendment, there were 52 signals and complaints received during the previous year.[71] As a result of complaints and signals received, the PPAgency filed three complaints with the CPC against decisions of contracting authorities which had initiated procedures containing conditions or requirements giving preference to particular persons or unduly restricting the participation of entities in the procedure. According to the annual report of the PPAgency for 2012:

> 'The most significant violations which provoked application to appellate authorities are the unreasonably high requirements as to the economic and financial situation of the participants and their staff, requests for documents which are not relevant to the subject of the specific contract *etc*. Two of the cases were rejected by the CPC on the ground of lack of legal interest since the procedure had been terminated by the contracting authority. The third complaint was heard in substance and the decision of the contracting authority was annulled as unlawful. The contracting authority then filed a complaint with the Supreme Administrative Court which upheld the decision of the CPC, *i.e.*, the appeal was affirmed.'[72]

Thus only three out of the 52 cases (just under 6%) for that particular year resulted in cancellation of contracting authority actions.

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69 SG 93/2011, effective as of 26.2.2012.

70 The previous text of PPA, Art, 19 (2), it. 3 (amended SG 94/2008, effective as of 1.1.2009) ran as follows: 'when receiving a signal, shall appeal before the Commission for the Protection of Competition any decisions for the opening of procedures, which approve notices containing conditions or requirements providing an advantage or unjustifiably restricting the participation of any parties in public procurement'.

71 Data taken from the *Annual report on the activities of the Public Procurement Agency 2012*, p. 19.

72 *Ibid.*

Notwithstanding this low percentage, such appeals could create a lasting precedent in the sector concerned, as participants realise that certain conditions will indeed be considered discriminatory and must be avoided in the notifications; this may well reduce the risk of hidden corruption schemes in favour of a particular candidate.

After this right of appeal was limited, in some of the cases involving signals of infringements the PPAgency prepared responses to complainants, giving a reasoned refusal to take action. For those complaints, however, for which infringements were deemed to exist, appropriate recommendations were made to the contracting authorities. Where it was established that there was reasonable suspicion of infringement of the law, at the stage of procedure implementation, the respective cases were sent to PFIA for *ex post* control.

Under the present legislation, decisions of contracting authorities on the following matters are open to appeal: (i) public procurement award including through application of a framework agreement, a dynamic purchasing system or a qualification system; (ii) conclusion of a framework agreement; (iii) creation of a dynamic purchasing system or qualification system; (iv) project competition. These decisions may be appealed to the CPC as to their legality, including the existence of discriminatory economic, financial, technical or qualification requirements in the notification, or any other parts of the documentation package prepared by the contracting authority. Following completion of the investigation and research into the complaint, CPC schedules an open meeting to consider the matter. After clarifying the dispute from a legal and factual side, the CPC proceeds, in a closed session, to take its decision; this marks the end of the administrative proceedings before the CPC.

In its decision the CPC generally has the following legal options. *First*, it may decide to take no further action. This means that the CPC finds that the complaint is unfounded, as the defects of the tender procedure alleged by the applicant have not been explicitly proved. Another situation in which no further action may be taken is when the contracting authority has concluded the relevant contract and a temporary

measure 'suspending the execution of the contract' was not imposed,[73] either due to the CPC's refusal to grant it, or due to cancellation of this temporary measure by the court. *Secondly*, the CPC may find the complaint justified and conclude that illegal actions (or inactions) have been committed, or that illegal decisions have been issued during the award procedure. In this case, the decisions are regarded as taken in violation of substantive or procedural norms. The CPC may impose sanctions or annul the act, inaction, or decision concerned, and can return the procedure to the stage of the last lawful decision or action undertaken, thus requiring the procedure to be re-run in a lawful manner from that stage onwards. There is also the opportunity for the CPC to provide instructions on the future course of the public procurement; these are binding upon the contracting authority. *The third option* is the decision of the contracting authority to be declared void.

Supreme Administrative Court

The party whose legal interests are affected by the operative part of the decision of the CPC may lodge an appeal within 14 days of notification of the parties, to a three-member panel of the Supreme Administrative Court (*Върховен Административен Съд*, SAC). This is the second, but first judicial, instance of appeal under the PPA. The complaint is filed through the CPC with a copy for all parties concerned. The consideration of the legality of the CPC's decision takes place in open court. The decision of the three-member panel is final and not open to further appeal. SAC can confirm or annul (in whole or in part) the decision of CPC.[74]

Regardless of the fact that contracting authority decisions can be

[73] According to PPA, Art. 120a (1), the appeal suspends the award procedure only if directed 'against the decision on the selection of contractor'. In all other cases an interim 'measure of suspension' may be requested, to be decided on by the CPC, with the decision of the CPC being appealable to the Supreme Administrative Court.

[74] A less common hypothesis is for SAC to repeal the decision of CPC. SAC Decision No 13193 of 10.10.2013 runs to that effect (due to unsubstantiated legal conclusions reached by the CPC), as well as Decision No 1760/2.4.2011 (due to lack of grounds for the legal conclusions and discrepancy with the evidence provided under the case); No 13781/17.11.2010 (lack of substantiation) *etc*.

appealed by stakeholders or candidates[75] before the CPC (and, respectively, at a later stage, before the SAC) on the basis of 'the presence of discriminatory economic, technical or qualification requirements in the contract notice, the contract documents and any other document related to the procedure',[76] given that only the legality of the statements issued by contracting authorities is examined, no significant corruption prevention can be expected to arise from the activities of these two instances. Some of the criteria used by contracting authorities have, indeed, been branded discriminatory over the years,[77] but others are constantly being coined in their place, the detection of which requires expert analysis which is very rarely carried out at appeal level. The two institutions simply lack the financial means to employs such experts; thus certain very particular criteria concealing purely corrupt motives for contract conclusion with a desired candidate remain undetected.

As part of this study, several interviews were conducted with SAC judges who chose to remain anonymous. Some of the interviewees, while commenting on the most common violations in public procurement awards, said that they did not feel that the award procedures suffered from frequent corruption. Their standpoint confirms the view that legality control over decisions issued by contracting authorities up to the contract conclusion stage cannot and could not be an effective corruption detection

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[75] According to § 1, items 6b, 6c and 6d of the supplementary provisions of PPA, the parties interested in appeal may be: '1.'Candidate concerned' – a candidate who has not been definitively excluded from participation at the stage of qualification proceedings because the said candidate has not been notified of the exclusion or the proceeding for appeal of the decision whereby the said candidate has been excluded has not been completed; 2. 'Tenderer concerned' shall be a tenderer who has not been definitively excluded from a procedure. An exclusion shall be definitive where the tenderer has been notified of the decision whereby the said tenderer has been excluded and the said decision has entered into effect. A tenderer concerned shall furthermore be any tenderer who has been ranked but who has not been selected as a supplier, contractor or service provider; 3. 'Interested party' shall be any person who or which has or has had an interest in being awarded a specific public procurement and who or which has sustained or is likely to sustain a damage resulting from the alleged infringement'.

[76] PPA, Art. 120(2).

[77] CPC Decision 531/2007 and CPC Decision 1136/2007 declare the criterion 'number of subscribers of the mobile operator at the date of tender submission' as discriminatory; CPC Decision 983/2007 defines the criterion 'number of roaming agreements concluded' as discriminatory in some cases; CPC Decision 39/2007 declares the requirement that each participant must indicate a list of major construction contracts performed in the country and EU states over the preceding 5 years as discriminatory *etc*. See also Kovacheva, A. (2008) *Public Procurement Award*, Sofia: Fenea Publishing, pp. 29-41.

and anti-corruption mechanism in the award process. Appellate authorities may, in fact, declare that certain procedures are completely lawful and demonstrate sufficient transparency of documentation and of the award process, even when these same procedures are, in reality, 'tailor-made' for a specific candidate, with the corruption scheme developing only at the stage following contract conclusion.

2.4. ELECTRONIC CONTROL MEASURES

With the 2014 amendments to the PPA[78] the Bulgarian legislator has taken the first steps towards e-procurement and the introduction of electronic options in the field, seeking to simplify the procedure and reduce the bureaucratic burden in compliance with the New Procurement Directives. Since October 2014 control bodies are able to use: (a) the e-Monitoring platform[79] and (b) the e-Audit platform.[80] It is as yet too early to draw conclusions as to the successful operation of these two platforms but they will definitely be a step towards reducing the human factor in procurement awards and hence provide an option for more adequate control. They need, however, to be supplemented by further electronic options to be used by both contracting authorities and all other stakeholders; this needs to take place in the next few years if the PPA is to be on track with the European trend for gradual transition to full e-procurement.

What is more, again for the purpose of improving the level of information, publicity and transparency in awards and to increase the

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78 SG 40/13.5.2014, effective as of 1.7.2014.

79 This platform collects, maintains and provides online access to the protocols from all public procurement award commissions, all framework agreements, all contracts between contracting authorities and contractors, additional agreements to such contracts, and subcontracting agreements.

80 This platform includes a communication system allowing natural persons and institutions to submit, in standard form, alerts and signals for deviations from PPA in the performance of award procedures and contract implementation. These alerts will also serve to verify and improve review and control measures and to aid analyses aimed to develop further anti-corruption measures.

opportunities for control over procurement procedures, the new text of the PPA introduces the requirement for each contracting authority to maintain, on its official webpage, a 'buyer's profile', which must contain the entire file for each and every procurement procedure. The overwhelming amount of documentation resulting from this effort to safeguard the transparency principle was discussed in chapter 1 of this study. Here, however, the focus is on the potential of these documents to assist procedure control.

On the one hand, there is no clear answer to the question why, given that the New Procurement Directives allow an extra 2½ years' postponement of transposition and compliance with the rules on electronic procedures,[81] the Bulgarian legislator has opted to commence precisely with those rules, when there are many far more significant rules on which the legal framework could focus.

Secondly, the Explanatory Memorandum on the amendment of PPA[82] justifies this superimposition and overlapping of information submitted to the PPAgency and the OJEU and information uploaded on the buyer's profile as working precisely towards enhanced public control on procurement. This completely unnecessary hassle for contracting authorities, however, will serve to deprive them of the opportunity to exercise *ex ante* and ongoing control over their own procurement procedures rather than achieve any other purpose. Such massive information will be of little interest to anyone other than the parties concerned, who will have access to this information anyway, as well as the opportunity to appeal it.

Ex ante control carried out by the Executive Director of the PPAgency covers an explicitly defined set of documents related to a

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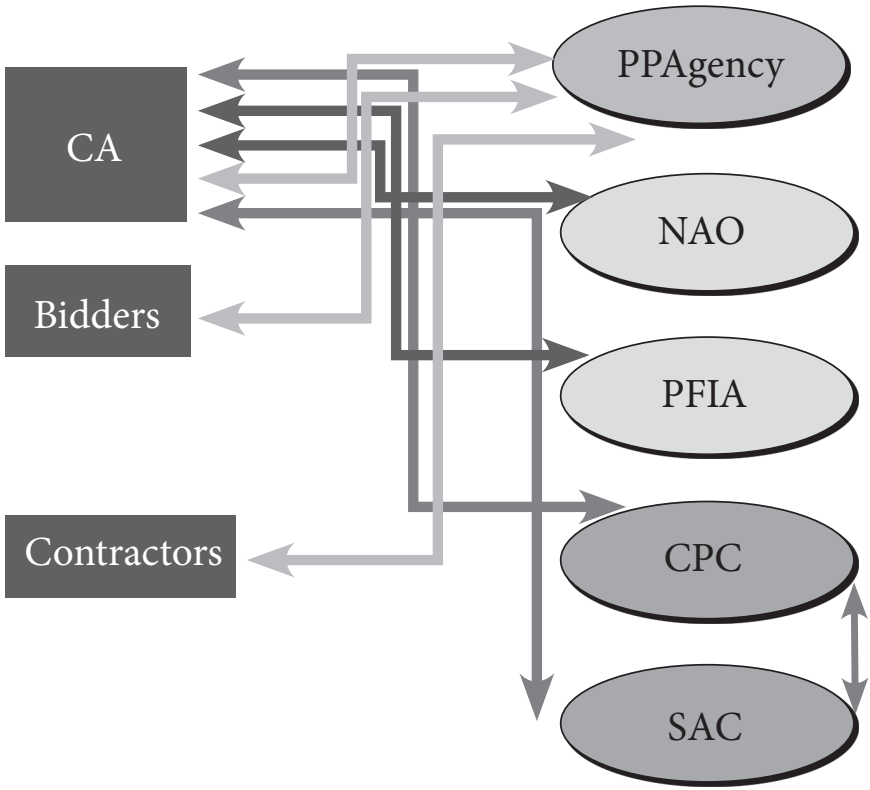
[81] Directive 2014/24/EU, Art. 90(1) & (2) and Directive 2014/25/EU, Art. 106(1) & (2) require transposition to be completed by 18.4.2016 and the transition to an electronic award process by 18.10.2018 (except where electronic means is mandatory (see Arts. 90(2) & 106(2) respectively)).

[82] *Explanatory Memorandum for the draft Bill amending and supplementing the Public Procurement Act 2013*, Government.bg, (2015). *www.government.bg.* [online] Available at: http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0211&n=73&g [Accessed 28.5.2015].

limited scope of procurement procedures; hence this largely overlapping information will not be of much use for more efficient *ex ante* control.

3. Diagram of participants in public procurements procedures and the authorities of control and appeal



4. CAN YOU KISS?

It is apparent from the above that the relationship between the separate authorities and their functions is extremely complex, partly because of the Directives themselves, but partly because of the choices made by the Bulgarian legislator. Moreover, there is a trend towards expanding the circle of contracting authorities under the PPA. The review of the types of controlling and appellate authorities is further relevant for this research, in so far as Directive 2007/66/EC (the Remedies Directive)[83] imposes on Member States the general obligation to provide effective remedies for violation of the public procurement rules.

The conclusion is that most of the institutions discussed (the PPAgency, the PFIA, the CPC, and the SAC) basically exercise control over the legality of contracting authority actions. All procedural rules are exclusively and strictly observed in line with the basic principles of public procurement, and reports on any inaccuracies found are presented on an annual basis. In recent years, there has been significant progress towards achieving greater transparency in the actions of contracting authorities and individual bodies. The annual reports of controlling institutions demonstrate the higher degree of accountability of the actions of participants in the procedures. However, this in no way creates insurmountable obstacles to candidates and contracting authorities in their quest to create increasingly ingenious and resourceful instances of corruption and ensuring that a predefined candidate comes out on top. This will be discussed further in the following chapters.

In addition, the structure of control and appellate authorities is too burdensome and multi-instanced. Some of the institutions have vague powers to interfere in or to improve the procurement process. Further, *ex ante* control is concentrated mainly within the powers of the Executive Director of the PPAgency and is vastly reduced in scope. Ongoing control is internally implemented, not independent enough and prevents corruption

[83] Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJEU L 335/31, 11.12.2007, as amended.

at the lower and middle level of administration only. *Ex post* control is distributed too fragmentarily among the different authorities, without achieving serious results in exposing corruption and infringements. The PFIA has greater responsibilities, but is limited to the implementation of legality control only (monitoring mainly conformity with the procedural rules in the conduct of the procedures). The NAO is entitled to analyse the efficiency and effectiveness of the awards but has no powers to act on alerts. It was observed above that this body has so far been inoperative due to its constant restructuring and changes in functions. Finally, the appellate authorities – the CPC and the SAC – also focus only on compliance with the letter of law. In other words, as Pashev and Marinov conclude 'the responsibility for fighting corruption remains mostly a national obligation'[84] which is certainly not enough for the moment.

[84] Pashev, K. and Marinov, K. (2009). *Reducing corruption risks and implementation of good practices by the management of public procurements*. Sofia: Center for the Study of Democracy, p. 114.

Chapter 4

WHO IS TRYING TO DO SOMETHING?
SOME WARRIORS IN THE UNEVEN BATTLE AGAINST CORRUPTION IN BULGARIAN PUBLIC PROCUREMENT

'[C]ommending himself with all
his heart to his lady Dulcinea, [...]
he charged at Rocinante's fullest
gallop and fell upon the first mill
that stood in front of him.'

Miguel de Cervantes Saavedra,
'The Ingenious Gentleman Don
Quixote of La Mancha'

While studying corruption in the implementation of public procurement procedures and offering a comparative analysis of the best practices of some other Member States,[1] it is appropriate to summarize and evaluate *what has been accomplished so far* in this area. It is thus necessary to comment on the methods for measuring the level of corruption in Bulgaria, the research conducted in order to detect the best way to limit the manifestations of this phenomenon in public procurement, as well as to discuss their practicability.

Precisely for this reason, and also with the purpose of highlighting the conclusions which this work attempts to draw, the present chapter

[1] See chapter 6 *et seq.*

focuses on the organisations and institutions, which in recent years have been researching the manifestations of corruption in this sector in Bulgaria and have proposed a variety of combat measures. Their chosen course of action and the proposed schemes and projects aimed at preventing corruption in public procurement will be examined. An assessment of the various proposals will be made based on current legislation, taking into account the level of modernisation of the procurement system in Bulgaria, its weaknesses, and the expectations of the EU Commission that measures to handle corruption in the spending of public funds need to be taken urgently.

1. WHO ARE THEY?

In the years following transition and especially in the years of pre-accession of Bulgaria to the EU, corruption at all levels and spheres of activity was quickly identified as a major problem for the development and establishment of the country as an economically stable and democratic rule of law country. As a consequence, numerous governmental and non-governmental organisations and institutions emerged, which claimed to investigate corrupt practices and to offer various prevention and sanctioning solutions.

The state apparatus also created various committees and agencies with the purpose of exposing corruption and alerting the prosecutor's office, but, given their dependence on political structures and the executive power, they have not achieved any satisfactory results.[2]

On the other hand, the Bulgarian public and media tend to react critically to any initiative in the area. Each new preventive measure is

[2] *i.e.*, (i) the Commission for Prevention and Countering of Corruption - chaired by the Minister of Interior. It coordinates and monitors the drafting and implementation of anticorruption strategic documents.; (ii) the State Agency for National Security – an agency acting under the umbrella of the Council of Ministers and focusing on protecting national security; one of the aspects of its activity is the detection of 'large-scale' corruption; (iii) the Commission for Prevention and Ascertainment of Conflict of Interest – an independent body focusing on the detection of conflict of interest in the public sector. It has predominantly supportive functions with regards to the detection of corruption in public procurement *etc*.

quickly stigmatized as ineffective, overly expensive to the taxpayer, politically or geopolitically driven, and/or funded by countries of varying economic influence.

In the light of the above it should be stressed that the present work examines the methods and analyses of those organisations, which, in the present author's view, have had some beneficial impact on curbing corruption or have at least (i) laid the groundwork for an effective system to limit tender manipulation or (ii) have made proposals for such measures that could prove to be adequate. The focus of the author lies on the achievements and proposals in the field of anti-corruption policies in public procurement; the analytical approach in evaluating the results is used for the purpose of this work alone.

There are three active organisations in Bulgaria which have made major contributions to the development of projects and models designed to prevent corruption, to the study of its specific manifestations in the different phases of public procurement and implementation, as well as to the sharing of certain models which have already shown their efficacy in other countries. These organisations have a very different approach and focus of activity and therefore the 'end product' achieved offers a radically different viewpoint as to the manner in which corruption in public procurement should be treated:

(a) *The Center for the Study of Democracy* - a non-profit organisation that continuously invests in the collection and analysis of information on current anti-corruption practices at various levels of government (including in the area of public procurement), explores the 'national traits' of corruption and establishes a complete set of indicators to measure the level of corruption in the country, although these are not the only means of measuring the subjective perception of corruption in society.

(b) *Transparency International in Bulgaria* - the national chapter of Transparency International also invests a lot of effort locally to analyse corruption in Bulgaria and in particular the weaknesses of public procurement procedures compared with the provisions of the law and the way those provisions are currently implemented. Apart from applying the Corruption Perception Index, at the end of 2013 the national representative organisation announced that it will

attempt to implement an Integrity Pact in public procurement, following the example of many other European and non-European countries where this initiative of Transparency International has yielded positive results. A special report was presented on the Bulgarian model of the Pact and the results of its pilot implementation, the impact and applicability of which is discussed below.

(c) *The Center for Prevention and Countering Corruption and Organised Crime and the BORKOR project* – the Center for Prevention and Countering Corruption and Organised Crime was established in response to constant criticism by EU and its insistence that a centralized body should be established to develop a successful and working model for fighting corruption in close cooperation with the government of Bulgaria. The BORKOR project was widely criticized both by civil society (for being too expensive to the taxpayer) and in EU Commission's 2014 report on Bulgaria,[3] as being ineffective. However, the Center for Prevention and Countering Corruption and Organised Crime has its own strategy and has offered a corruption prevention model with a particular focus in the area of public procurement.

2. CENTER FOR THE STUDY OF DEMOCRACY

The Center for the Study of Democracy (*Център за Изследване на Демокрацията*, CSD) is a non-profit organisation with a broad scope of activities. CSD engages in various social initiatives, international cooperation and exchange of information, research and sociological studies, economic analyses, training and consultancy *etc*.

The CSD was founded in late 1989 and is an 'interdisciplinary institute' which 'works for the development of democratic values and market economy'.[4] CSD is an independent organisation with the following

[3] *Report on Progress in Bulgaria under the Co-operation and Verification Mechanism*. (2014). Brussels, 22.1.2014.

[4] Csd.bg, (2015). [online] Available at: http://www.csd.bg/index.php?id=177 [Accessed 28.5.2015].

main objectives: (i) to provide an institutional environment for the formulation of effective public policies for good governance, compliance with fundamental rights and freedoms and for an active role of Bulgaria in the European integration processes; (ii) to initiate and support institutional reforms in Bulgaria and EU in the area of justice and home affairs, and (iii) to monitor and assess risks to the functioning of institutions and the principles of democracy and market economy.

In the beginning, CSD functioned predominantly as an analytical centre, but in recent years it has become an active participant in the formation and implementation of a number of Public Policies. CSD deals specifically with the development and monitoring of anti-corruption policies and practices.[5]

One of the major achievements of CSD is the implementation of a national corruption index - CMS, as was discussed in details in chapter 2. It is the first of its kind and has been successfully applied in Bulgaria ever since the 1990s.

As was noted above, the CMS provides data on the dynamics of corruption among the public and in the business sector. It manages to record the actual level and the trends in the spread of administrative corruption in the country, as well as the related public attitudes, opinions and expectations.

The strengths of this methodology are precisely in the significantly expanded scope of analysis and the use of various sources of information and different methods of assessment, tailored for Bulgaria and its 'own' corruption mechanisms.

CMS registers the actual distribution and manifestation of corruption in the country. It does not rely solely on the perception of corruption, as is the case with CPI, making it, in this particular case, much more objective in terms of results.

In addition to establishing such national corruption monitoring

[5] CSD is the Bulgarian partner for many European institutions, networks and initiatives such as the European Union Agency for Fundamental Rights, the Global Distance Learning Network of the World Bank and the World Competitiveness Yearbook of the International Institute for Management Development in Switzerland.

system, CSD has set a number of other ambitious goals in the field of fighting corruption, some of them with positive results.

One of the fields of study of the CSD naturally covers the manifestations of corruption in public procurement. In a series of analytical reports, learning materials and methodologies developed over the last two decades, CSD outlines very clearly the bottlenecks in the implementation of the PPA, the corruption models used by contracting authorities and tenderers in the implementation and awarding of public procurement contracts and the main recommendations, in legislative terms, aimed at more timely prevention of corruption in public procurement procedures.[6]

Prior to discussing the findings of these studies, it would be interesting to note that some of the recommendations made by CSD for changes in legislation and for combating corrupt practices in one of its earliest works - the 2002 Corruption Assessment Report of CSD[7] - sadly continue to sound relevant today, and, in spite of the more than 30 amendments made to the PPA these recommendations have not been fully addressed yet:

> 'Despite the progress made in 2002 in the public procurement legislation it is further necessary:
>
> – To institutionalize responsibility for the overall implementation and monitoring of public procurement in an independent Public Procurement Agency;[8]

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[6] CSD issues Policy Briefs on an annual basis, on the levels of corruption and their impact on different public sectors, as well as annual reports on the level of corruption in the country and its manifestations, with a special focus on public procurement. It is from these studies that the above conclusions can be drawn. The most recent CSD analyses are entitled *Corruption and Anti-corruption in Bulgaria (2013 – 2014)* (2014), Policy Brief No. 46/ 2014, and *Anti-corruption Policies against State Capture.* 10th annual report providing an overview of the state of corruption and anticorruption in Bulgaria 2013 – 2014. The report is prepared as part of the Southeast Europe Leadership for Development and Integrity (SELDI) initiative.

[7] *Corruption Assessment Report 2002*, Sofia: Coalition 2000 / Center for the Study of Democracy. This was two years prior to the enforcement of the current PPA and four years before the major changes in the PPA that introduced the Public Procurement Register and launched the first amendments to the PPA, aimed precisely at preventing corruption and harmonisation of legislation with the relevant EU legislation.

[8] Under the new PPA, the PPAgency already exists, as noted in chapter 3, above, but has definitely not undertaken overall implementation and control of public procurement procedures – a fact which has been noted in EU reports.

– The National Audit Office and the State Internal Financial Control Agency[9] should be authorized to perform preliminary control over public procurement, *i.e.*, before contracting;

– [...]Evaluation committees' technical skills should be improved while their member's administrative and criminal liability should be defined more clearly'.[10]

These recommendations, made back in 2002, are fundamental for the organisation of a successful set of combat measures against corruption mechanisms and also for reducing the rate of violations and omissions in the implementation and awarding of public procurement contracts, regardless of their nature. As the analysis in chapter 3 revealed, the strengthening and proper organisation of control over public procurements is a key factor in the attempts to limit corruption. In addition, the NAO, as the supreme and independent audit institution of Bulgaria was identified as one of the currently very few options for investigation of inappropriate spending of public funds. The discussion of the work of the PPAgency and the functions of its executive director, from the point of view of control and prevention of corruption, also show that they remain ineffective to this day, in the format defined by the law. The competence of evaluation committees will be reviewed in the following chapter as well, but the conclusions do not differ significantly from those made fifteen years ago in the CSD report.

The above observations, brought to date on the basis of the current political and economic environment, have been confirmed by the CSD to be valid for the last few years as well:

'The lack of control over public spending in 2013 and 2014 coupled with long leadership vacuum at key revenue agencies and the de-facto blocking of anti-corruption law enforcement has resulted in the rise of public procurement and administrative corruption'.[11]

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9 Now the Public Financial Inspection Agency, see chapter 3.

10 *Corruption Assessment Report 2002* (2002). Sofia: Coalition 2000 / Center for the Study of Democracy, p. 92.

11 *Corruption and Anticorruption in Bulgaria (2013 – 2014)* (2014). Policy Brief No. 46/2014, Sofia: Center for the Study of Democracy, pp. 19-20.

This analytical report by the CSD - unprecedented in Bulgaria - was prepared in 2006, immediately after the changes in the PPA.[12] The report[13] diagnosed the critical corruption risk areas in the public procurement sector and the measures to reduce this risk. The focus of the report was the energy sector, where the risk of corruption in public procurement is particularly high due to the fact that huge funds are involved without an adequate system for *ex ante* and more importantly *ex post* control on the implementation of legislation. The conclusions of the report, summarized below, provide an exceptionally objective reading of the PPA and the practice of its implementation, which is of general relevance.

Firstly, contrary to the established practice of constant changes to legislation, the report notes that the biggest problem lies in control rather than in the law itself. The control system, it is argued, should be focused primarily on large transactions characterized by a high potential risk of loss of public funds. Thus a modern risk assessment system would place the focus of control on those transactions that involve a single tenderer or negotiated procedure to check if they are in the public interest and satisfy the requirements for maximum competition. This approach implies a risk assessment system and shifting of the burden from the currently predominant control of legality to control over the appropriateness and effectiveness of public procurement. This shift fully corresponds to the conclusions drawn in the preceding chapters of the present work.

Secondly, another omission reviewed by the report, which is still relevant at the moment, is the lack of adequate control at the contract implementation stage.: '[T]he legal framework with regard to public procurement covers only the awarding procedures, *i.e.*, the whole process up to the signing of the contracts. [...] However, the PPA contains no [*sufficient*][14] guarantees and control mechanisms against abuse in the implementation phase'.[15] It is only with the 2014 amendments to the

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[12] SG 105/29.12.2005, effective as of 1.1.2006.

[13] Pashev, K., Dyulgerov, A., Kaschiev, G. (2006). *Corruption in Public Procurement: Risks and Reform Policies*, Sofia: Center for the Study of Democracy.

[14] Emphasis added.

[15] See *supra* note 13, p. 64.

PPA[16] that NAO and PFIA were given the power to audit and inspect contract implementation (but not contract quality). It is still too early to predict what this type of inspection will achieve in practice. Needless to say, this development is a clear indication of legislative progress which deserves recognition, but given the existing shortcomings in the operation of these two bodies, as noted in chapter 2, it is impossible to judge whether their control over contract implementation could constitute a significant anti-corruption factor.

Thirdly, the report also considers the mechanism of appeals in public procurement to be ineffective in terms of detection and sanctioning of corruption in the implementation of public procurement procedures and the award of contracts. The conclusions drawn by Pashev, Dyulgerov and Kaschiev coincide to a large extend with those drawn in chapter 3 of this study. In addition they also support the utilization of the capacity of administrative courts instead of the CPC, which currently acts as the first instance in the appeals process.[17]

Fourthly, the report contains a satisfactory analysis of the most common corruption-related violations of procedures. These violations will be scrutinised and fully discussed in the next chapter, but some typical examples listed in the reports of the CSD are:

> '– [...] Repeated subsequent implementation of procedures for the award of procurement contracts covering the same subject;
>
> – Unjustified termination of procedures for the award of public procurement contracts;
>
> – Use of the same consultants in various roles and level of dominance in the market of consultancy services;
>
> – [...] Linkages between companies one of which is the consultant in an investment project, another is the buyer or the consultant [...]'.[18]

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16 SG 40/13.5.2014, effective as of 1.7.2014.

17 See *supra* note 13, p. 60 *et seq.*

18 *Ibid*., p. 54.

Last but not least, the report comments on a number of measures to curb corruption in public procurement, which remain outside the system of award and implementation of public procurement contracts, but are crucial in the context of curbing political corruption. These are related to the financing of political parties, the conflict of interest, the regulation of lobbying activities *etc*. The substantiated conclusion is reached that without progress in these areas no positive results in the optimization of legislation and control in the field of public procurement could be expected.

The CSD continues to carry out serious analytical work each year.[19] Despite the fact that the CSD (unlike the two institutions discussed below) does not claim to provide working mechanisms for prevention of corruption in public procurement, the analytical and science-based categorization of the main problems and outlining of the urgent legislative measures that need to be taken constitute an undeniably sound basis for the development of anti-corruption policies tailored to the individual characteristics of the national system of public spending. Unfortunately, however, there is a tendency in Bulgaria to not always take into account the achievements of the theoretical mind, and '[s]ignificant legislative changes are made without any appropriate justification of the need for such changes and without any prior expert and public consultation'.[20]

3. TRANSPARENCY INTERNATIONAL BULGARIA

The National representative organisation of Transparency International in Bulgaria (*Прозрачност без Граници България*, TIBG) was founded in 1998. Ever since then, for nearly two decades, it has established itself in the country as one of the organisations that have broad

[19] One of the most recent works of the CSD, analysing, once again, among others, the issue of corruption in public procurement is - Stoyanov, A., Stefanov, R., Velcheva, B. (2014). *Bulgarian Anti-Corruption Reforms: A Lost Decade?*, Sofia: European Research Centre for Anti-Corruption and State-Building, Working Paper No. 42 and Center for the Study of Democracy.

[20] *Corruption and anti-corruption in Bulgaria (2012 – 2013)* (2013). Policy Brief No. 43/2013, Sofia: Center for the Study of Democracy, p.8.

activities directly aimed at the creation and implementation of projects to combat corruption at national and regional level.

The major characteristics of TIBG, of course, stem from its status as the Bulgarian branch of Transparency International: '[T]o join the efforts of governmental institutions, local authorities, civil society, the private sector and the media so as to undertake systematic reforms and initiate specific tasks for curbing corruption in the country'.[21]

Like CSD, TIBG conducts research initiatives related to the problems of corruption by mobilizing the efforts of researchers, public figures and experts in the relevant fields, collects, presents and disseminates the necessary analytical information among governmental institutions and civil society organisations, develops civic initiatives and projects aimed at reducing corruption *etc.*

One of the major functions that TIBG is associated with is the issuing of the annual Corruption Perception Index (CPI), the mechanism and functions of which were reviewed in chapter 2. The index created by TI is now globally regarded as a 'measure' for corruption. CPI ranks more than 170 countries (including Bulgaria since 1998) in terms of corruption, by the use of high quality data sources, such as polls and surveys which rank different countries and territories. As has already been demonstrated, however, Bulgaria has its own mechanism for the measurement of corruption in the country (*i.e.*, the CMS), which proves to be more specific and accurate due to the wider scope of the study and the careful attention to national specifics. Chapter 2 above made a note of the shortcomings of the CPI and its limited methodology which reflects on the resulting statistics regarding corruption in public procurement.

In the field of public procurement the TIBG has, nevertheless, conducted two major analyses in the last few years, which certainly have contributed to the development of anti-corruption measures in public procurement, although the results cannot unambiguously be determined as positive.

The first of these analyses is the paper '*Corrupt violations in public*

[21] [online] Transparency.bg. Available at: http://www.transparency.bg. [Accessed 29.5.2015].

procurement' issued in 2007.[22] This is a particularly detailed and well-conducted research on the classification of the key manifestations of corruption and infringements in the implementation of public procurement procedures in Bulgaria.

The authors of the paper examine the corruption environment in the application of PPA, drawing on the major prerequisites for its occurrence (*i.e.*, distortion of business competition, inclusion of unusual requirements to applicants, sending invitations to a small number of related parties, illegal actions by the commission *etc*., which are discussed in detail in chapter 5 of this research). The paper provides a detailed typology of the types of violations and mechanisms for circumventing the statutory rules of procedure:[23] calculation of the contract value so that the contract will fall below the legal thresholds for conducting a procedure; stating, in the decision to initiate the procedure, of a contract subject different from the actual one; evaluation of proposals that is not based on any clear methodology *etc*.

Again (as in the papers drafted by CSD) the paper poses, among others, the questions of improving the public procurement control system, preventing the restriction of competition, implementing a system of penalties. Another serious issue examined by the analysis is the issue of curbing political corruption that directly affects the awarding of procurement contracts. The point is made that the increased introduction of electronic technology in the implementation of public procurement procedures has a strong anti-corruption effect. Finally, the authors of the study commissioned by TIBG sustain the belief, which the author of this research also supports, that (despite the expectations of society):

> 'In general, the Republic of Bulgaria has modern legislation on public procurement, which in its spirit and content is harmonised with the EU legislation in the field of public activity [...] *By no means can* the harmonisation of legislation solve specific problems in the public sector management and the

[22] Stoytchev, S., Ilieva, S., Mitev, J. (2007). *Corruption irregularities in public procurement*, Sofia: Center for the Study of Democracy.

[23] This issue is also the subject of chapter 5, where the present author presents her own classification of the different types of offenses based on current legislation.

restriction of corruption environment.' [24]

What deserves greatest attention is the work of TIBG in the last years, reaching its final form in December 2013. This refers to the Bulgarian version of the 'Integrity Pact' developed in the field of public procurement, which presents the TIBG concept of a working anti-corruption model in the spending of public funds.

TIBG's project was launched in 2009 under the title '*Increasing Integrity through Advocacy: Counteracting Corruption in Public Contracting*' and was based on the Integrity Pact created by Transparency International and used worldwide.[25] The Integrity Pact is a tool developed in the 1990s by Transparency International as a solution against the development and use of corrupt practices, non-transparent and inefficient management of public resources. 'This is a model applied in over 15 countries worldwide, including EU Member States, which are characterized by varying degrees of socio-economic development and have different management cultures'.[26] The Integrity Pact in Public Procurement (the Pact) is a voluntary contract between a contracting authority, the participants in a public procurement procedure and an independent monitor, which allows for external civil monitoring of all actions of the participants and all documentation, to be carried out by such independent monitor throughout all phases of implementation of the public procurement procedure, including contract execution. The Pact establishes specific monitoring rules and binding commitments for the participants, requiring from the latter to provide information and allow direct monitoring at all stages. In addition, the Pact provides guarantees for the imposition of effective penalties to tenderers and/or individual penalties to their personal staff members, whose conduct runs contrary to good morals. On the other hand, the Pact also creates incentives to encourage

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[24] See *supra* note 22, p. 34.

[25] TIBG has made an effort to adapt the Integrity Pact version proposed for Bulgaria to the Bulgarian reality, to comply with the legal framework and the functions of administrative structures, as is explained in *Indicators of transparency and integrity in public procurement* (2013). Sofia: Transparency International Bulgaria, p. 09. Quite how much it has succeeded in 'tuning' the Integrity Pact to the needs for an effective fight against corrupt policies in procurement award is, in the opinion of the author of the present study, somewhat disputable, as will be explained below.

[26] See *supra* note 21.

participants to fulfil their commitments for openness and transparency in the implementation of the public procurement contract.[27]

Public procurement procedures carried out in compliance with the Pact's monitoring terms and conditions are deemed to both help limit the possibilities of using corrupt schemes and to create conditions for more effective management of public funds and expanding the access of businesses to public procurement contracts.

The pilot implementation of the Pact in Bulgaria, developed by TIBG, involves four Bulgarian ministries: (i) The Ministry of Regional Development and Public Works, (ii) The Ministry of Labour and Social Policy, (iii) The Ministry of Health, and iv) The Ministry of Transport and Communications. The results of this pilot with respect to several public procurement procedures (in the period of February 2012 to December 2013) and the basic principles and benefits of the Pact were presented by TIBG in December 2013 in the analysis '*Indicators of transparency and integrity in public procurement*'.[28]

This analysis clarifies the specific characteristics of the Bulgarian model of the Pact as a corrective to the use of corrupt schemes in public procurement. According to TIBG, the three highest risk areas in public procurement are: a) the decision to announce the procurement and the method for its implementation; b) the public contract parameters and c) procurement performance.[29] For each of these areas, the Pact has developed different sets of mechanisms aimed *inter alia* at strict observation of all applicable rules, objective personnel selection, monitoring.

In addition, TIBG offers the results of the pilot implementation of the Pact as part of the above analysis which allows for a number of

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[27] *Integrity Pact – Conceptual Framework* [online] Available at: http://integrity.transparency.bg/media/cms_page_media/1/IP_CONCEPT_BG_1.pdf and

Integrity Pact – Bulgarian Model, [online] Available at: http://integrity.transparency.bg/media/cms_page_media/1/IP_BULGARIAN_MODEL_BG_1.pdf [Accessed 29.5.2015].

[28] ed. Kashukeev-Nusheva, V., Hristova-Valtcheva, K., Slavov, K., Roumenova, L., Slavov, P., Gulubov, A. (2013). *Indicators of transparency and integrity in public procurement*, Sofia: Transparency International Bulgaria.

[29] *Ibid*, pp. 10-11.

observations on the Pact and the results of the pilot implementation:

(i) *The Pact is a voluntary act*

It may be signed between the public institutions and the tenderers in a public procurement procedure. What does this mean in practice? This means that not only the choice of whether to use the Pact is left to the discretion of the contracting authority (and possibly the tenderers), but also the choice of the public procurement procedure to which the Pact will be applied. This, in turn means that there could be no monitoring of the overall activity of a contracting authority. More cynically put, if the contracting authority and a tenderer or candidate intend to use corruption practices, then the Pact will simply not be signed (or there will be no proposal to sign it) for these public procurement contracts. What is more, the contracting authority may use the Pact for those contracts, where it has decided that it has no interest in manipulating the procedure in order to select the favoured candidate, making use of the incentive models of the Pact and thus getting to be listed in the White Paper (as described below).

(ii) *The Pact introduces the figure of the independent monitor*

According to TIBG's analysis an independent monitor is:

> '[A]n organisation, which is publicly renowned and through long activity in the area of fight against corruption has proven itself as independent, objective and impartial, which has experts with compelling professional and moral qualities, who would not make any compromises when it comes to taking measures to prevent or counteract offenses and socially unacceptable business practices. The independent monitor is selected by the contracting authority and by joining the Pact all participants unconditionally and irrevocably undertake to assist him in carrying out his activities and to comply with his recommendations and decisions'.[30]

The intended independent monitor is the TIBG, which fully fits the above description. The independent monitor would certainly have a disciplining and restraining influence on the participants in public

[30] *Ibid*, p. 12.

procurement, who will not only have an incentive to prevent corruption or any irregularities in the implementation of public procurement procedures but will also have the opportunity to use the monitor at a later stage as a mediator in resolving disputes and problems in the implementation of the contract once the procurement contract has been signed. However, given this formulation, the contracting authority is free to select another independent monitor (whose only characteristics are those specified above). It is not clear from the text of the analysis and the model Pact Agreement (apparently signed in this form in the pilot implementation of the model) precisely how the contracting authority should select this 'independent monitor', what professional requirements it would have to meet, what the selection criteria should be,[31] and how its relationship with the contracting authority should be settled so that the monitor can express its intention to participate in the public procurement procedure. There is no indication, for example, whether there should be a register of 'respected' and 'impartial' organisations, or whether it should be the contracting authority that assesses the qualities of the monitor: does the monitor participate on a *pro bono* or paid basis *etc.*, how is the lack of relatedness to be proved, within the meaning of the Bulgarian Commercial Law[32] [33] between the contracting authority and the monitor on the one hand, and between the contracting authority and the tenderers - on the other. Therefore there is no mechanism in place to prevent applicants or tenderers related to the monitor from participating in the public

[31] In a competition interview, for example, where the complexity of the public procurement and its more complicated nature make it impossible for the contracting authority to specifically determine its object, the pre-selection of an independent monitor with good professional qualification would be even more difficult.

[32] Commerce Act (*Търговски Закон*), promulgated SG 48/18.6.1991, effective as of 1.7.1991, as amended.

[33] Commerce Act, Art.1, (1) 'Related persons' within the meaning of this Law shall be: 1. Spouses, relatives on direct line of descent - without any restrictions, relatives on collateral line of descent - up to and including the fourth degree, and in-law lineage - up to and including the third degree; 2. Employers and employees; 3. Persons one of which is involved in the management of the other one's company; 4. Partners; 5. A company and a person who owns more than 5 percent of the company's voting shares and stock; 6. Persons whose activities are under the direct or indirect control of a third party; 7. Persons who exercise joint direct or indirect control over a third party; 8. Persons one of whom is a commercial agent of the other; 9. Persons one of whom has made a donation in favour of the other. (2) 'Related persons' shall be also persons who either directly or indirectly participate in the management, control or capital of another person or persons, which may enable them to agree on terms and conditions which differ from the standard practice.

procurement.[34]

It is only Article 28 of the model Pact that states: 'Along with the text of the Pact [*available on the website of contracting authority*] information regarding the independent monitor is provided, on the basis of which conclusion as to the professional qualifications, reputation and impartiality of the independent monitor was reached'.[35]

(iii) *The White Paper of the Pact*

In analysing and comparing the different Pacts implemented worldwide by TI as anti-corruption buffers in public procurement, it needs to be noted that for the Bulgarian model TIBG have chosen (in an attempt to adapt it to the specific characteristics of Bulgarian economic reality and valid legislation) to focus on encouraging participants towards fair and transparent conduct and implementation of public procurement in accordance with the monitoring and rules of the Pact, creating a White Paper (to be maintained and updated by the individual contracting authorities), to champion for and promote those participants who clearly emphasize their anti-corruption commitments and behaviour. The sanctioning aspect for failure to fulfil the commitments undertaken under the Pact and the manifestation of 'unacceptable behaviour'[36] is minimized and shifted to the background at the expense of the incentive aspect. Such an incentive model is not a good way forward; its educational function with regard to anti-corruption measures in the field of public procurement is unclear. Moreover, the White Paper serves to 'advertise' the proper behaviour of the respective participants in public procurement, which gives contractors some confidence for subsequent participation in other procedures. A positive reputation of the participants is built, which is

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[34] The monitor is apparently present at a much earlier stage in the implementation of the procedure – as early as the preparation and announcement of the criteria.

[35] See *supra* note 27, p. 94.

[36] The Pact, Art. 24, it. 1 of the Pact: 'Unacceptable behaviour shall be: (a) Any behaviour that may adversely affect the judgement and motivation of the contracting authority, its employees, the tenderer or third parties, including such behaviour, that is permitted by law, but is inconsistent with the best practices, the morals, the goals and the spirit of this Pact; (b) The provision to a tenderer, the contracting authority or a third party of information that has become known in the course of implementation of this Pact or the public procurement award or implementation procedure by a tenderer, the contracting authority, their employees, contractors or subcontractors'.

based solely on cases in which the Pact was applied (at the discretion of the contracting authority and the participants). As noted above, it is quite possible that the same organisations have been involved in corruption schemes in other public procurement procedures in which the Pact is not invoked. This would prepare the ground for favouring of certain public organisations and representatives of individual businesses.

(iv) *The time factor*

Time should also be taken into account when considering the merits of the Pact. The deadlines for open procedures are relatively long, but not for negotiated procedures (with or without call for proposals) or electronic tenders, and it may be difficult for the analysis and evaluation of the documentation by the independent monitor to fit into statutory deadlines This problem is also evident in the reported results of the pilot implementation of the Pact:

> 'The lengthy period of agreeing the commitments under the Integrity Pacts resulted in the monitoring actually started after drafting of the tender documents for the relevant public procurement procedures. This predetermined the method which was applied for review the drafted documentation - subsequent monitoring of already completed documentation. Access to contracting authority decisions and tender documentation was not provided until after the start of the procedures'.[37]

The Pilot implementation of the Pact demonstrates that at a certain stage of the award and implementation the tenderers themselves ignore the independent monitor, communicating with each other without notifying him/her, or not taking advantage of all monitoring and assistance options available in the Pact at the document preparation stage. The attitude towards popularization of the White Paper is also too torpid and lacking in enthusiasm.

(v) *Many questions remain open*

Matters such as implementation of the Pact in the case of subcontractors and the use of framework agreements remain unsolved.

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[37] See *supra* note 27, p. 30.

An initial conclusion from the analysis of the corruption prevention model proposed by TIBG is that the model is not a 'curing pill' for the profound corruption problems in the implementation of public procurement procedures in Bulgaria. However, this anti-corruption initiative definitely creates conditions for the implementation of more effective control at the three main stages of public procurement (preparation, award and implementation) and has a disciplining effect on the parties to the Pact. Further adjustments in the Bulgarian model are definitely required for the initiative to be successful and its popularisation to be effective. To this end, the individual approach in the creation of the Bulgarian Pact should be strengthened so that it can address the specific needs of Bulgaria to a much greater extent. If for Scandinavian countries (the countries with the lowest level of corruption, at least according to CPI) and older EU Member States this model is definitely not a novelty and its merits are clear and bring positive results, for Bulgaria this type of prevention sounds, at least for the time being, a bit exotic. For this reason many elements of the rules of the Pact, which are 'implied' or rely on statutory provisions of the relevant legislation need to be further elaborated in much greater detail for the purposes of the Bulgarian public procurement system. This, of course, is not impossible, but requires additional research and work in the field. Last but not least, strengthening the punitive element in the implementation of the Pact in Bulgaria will not have a disincentive effect on participants in public procurement, but will, on the contrary, have an even stronger disciplining effect. 'Other sanctions could include the forfeiture of the bid or performance bonds, liability for damages and debarment regarding future contract opportunities for a period of time reflecting the seriousness of the violation'.[38]

[38] *Integrity in Public Procurement*. (2007). Paris: OECD Publishing, p. 87.

4. THE BORKOR PROJECT – AN ATTEMPT TO TRANSFER GERMAN EXPERIENCE IN BULGARIA

In November 2009 the Bulgarian government of Boyko Borisov adopted the '*National Strategy for Preventing and Combating Corruption and Organised Crime*'. Under the aegis of the Minister of Interior and the Deputy Prime Minister a national project called BORKOR (*БОРКОР*)[39] was established.

The Center for Prevention and Countering Corruption and Organised Crime (*Център за превенция и противодействие на корупцията и организираната престъпност*, CPCCOC) was set up for the purposes of the BORKOR project under the competence of the Council of Ministers.[40] CPCCOC is a legal entity, a secondary budget spending unit. It is not an operational structure and does not process corruption information or corruption alerts. Its sole objective is to develop comprehensive, effective and long-lasting effective preventive measures against corruption and organised crime.

The BORKOR project is a 'complex cybernetic model of centralized planning and development of effective measures and systems of measures against corruption'.[41] The concept behind BORKOR is a combination of technical and analytical methods aimed at the establishment of a highly productive system for identification of weaknesses ('gateways to corruption')[42] that cause or encourage corruption.[43] The model is based on the provisions of the project implementation standard adopted by the German Federal Government (the so-called 'V-Modell XT'). This established standard is adapted, according to CPCCOC, to the local conditions in Bulgaria. The author of the concept is the German expert

[39] The acronym is formed from the Bulgarian words '*Борба*' (Fight) and '*Корупция*' (Corruption).

[40] *Decree of the Council of Ministers* of 29.7.2010.

[41] Borkor.government.bg. [online] Available at: http://borkor.government.bg/bg/page/5 [Accessed 29.5.2015].

[42] This is the term that CPCCOC uses for those weaknesses in the procedures that open the doors for corrupt behaviour.

[43] An anticorruption formula has also been developed specifically for the purposes of CPCCOC, which helps to analyse the relationship between the factors that affect the behaviour of offenders.

Rolf Schlotterer, an adviser to the Bulgarian Government (March 2009 – October 2013).

One of the first areas on which the CPCCOC focused its attention through the BORKOR project was precisely the award and implementation of public procurement contracts in Bulgaria as the sphere that features a concentrated risk of corrupt schemes.[44] The Solution Model in the Area of Public Procurement (the Solution Model) is essentially web-based, with six electronic platforms operating in its framework. It uses the methodological standard adopted under the BORKOR project. The Solution Model is fully consistent with the recommendations of the expert group on electronic procurement eTeg[45] (part of the strategy of the EU Commission to introduce fully electronic procurement across the EU).[46] It incorporates four main aspects:

The technical part of the model consists in the development of six electronic platforms that interact with each other and support the procurement procedure from the first to the last stage. These are:

(i) *e-Register* – an electronic register, which is the central platform for all stakeholders in the award process; it contains information and documents for the procedure and predominantly supports the necessary legal and administrative steps to be undertaken prior to contract conclusion;

(ii) *e-Bidding* - active online bidding software applications;

(iii) *e-Catalogue* - an online platform supporting public procurement

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[44] On 21.2.2012, the Advisory Board of CPCCOC charged the head of CPCCOC with the development of a *Solution model in the area of public procurement*.

[45] [online] Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_etendering-expert-group-draft-report-part1_en.pdf. and http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_etendering-expert-group-draft-report-part2_en.pdf [Accessed 29.5.2015].

[46] [online] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0179:FIN:EN:PDF [Accessed 29.5.2015].

procedures that cover standardized products or products that can be visually presented (machinery, equipment, furniture *etc*.);

(iv) *e-Auction* - a classic form of announcing and awarding through online applications. Suitable for all three types of procurement contracts (works, services and supplies), where the procedure is more complicated and complex and the E-Bidding and E-Catalogue platforms cannot be used;

(v) *e-Monitoring* - a platform that collects data and performs centralized monitoring of all contracts, annexes, protocols *etc.*, which are entered into between government bodies and legal entities (the ambition being that even contracts outside the scope of public procurement be included in the platform). Platform applications include monitoring, statistics, analysis, reporting and other applications;

(vi) *e-Audit* – An online platform to conduct audits and analytical work for identification of violations of rules and laws. Access to this platform will be available to the state institutions responsible for auditing and reviewing the public procurement award process. In addition the platform contains a communication system that allows the receipt of alerts about suspected violations.

Since the Solution Model was forwarded to the Parliament as well, with the expectation that its recommendations would be taken into account with the 2014 amendments to the PPA,[47] some of these platforms are already operational, but there is still no overview of what has been achieved so far. As was commented in chapter 3, controlling bodies will now be able to use the 'e-Monitoring'[48] and 'e-Audit'[49] platforms. These platforms are not as comprehensively described in the PPA, as initially

[47] SG 40/13.5.2014, effective as of 1.10.2014.

[48] PPA, Art. 126a: 'In carrying out activities under this chapter, control bodies may make use of the e-Monitoring platform which shall collect, maintain and provide online access to the protocols of all procurement procedure committees, as well as framework agreements, contracts between contracting authorities and contractors, supplementary agreements to such contracts and subcontracting agreements'.

[49] *Ibid*, PPA, Art. 126b: 'In carrying out activities under this chapter, control bodies may make use of the e-Audit platform. The e-Audit platform comprises a communication system which allows natural persons and institutions to submit, in standard form, alerts for deviations from lawful conduct of procedures under the present act and proper implementation of public procurement contracts'.

envisaged by the Solution Model, but are close to those descriptions. An 'e-Catalogue'[50] has also been launched and offers standardized supplies. These were initially heavily criticized by the majority members of the expert group, organised by the CPCCOC to discuss the Solution Model,[51] as well as by members of the Parliamentary committee. Arguments were put forth as to how expensive and difficult, in terms of organisation, the introduction of such an almost completely electronic award process would be. The huge need for precisely such platforms was poorly accounted for - platforms which can (a) significantly lighten and simplify the award process which would no longer be so very dependent on the cumbersome bureaucratic apparatus, and (b) limit the human factor effect to a minimum and hence the spread of corrupt practices.

At a later stage, however, the legislator was acquainted with the trends serving as basis for the New Procurement Directives whereby it became clear that the Solution Model is not simply a copy-paste version of a similar working model in Germany, but that the EU[52] has expressly chosen the path towards electronic procurement and this model is regarded as a logical response to corruption in the sector. The e-Catalogue was explicitly created to facilitate contracting authorities in the award of standard procurements and its existence has already been codified in European legislation.[53]

Data collection for detection of corruption is the second aspect of the Solution Model. All information and documentation relating to procedures for the award of public contracts is collected and reviewed,

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50 *Ibid*, PPA, Art. 5a: 'The 'Electronic Catalogue' (e-Catalogue) is an online platform allowing the offer of supplies which have already been standardized or for which designated standards can be developed or adopted'.

51 The author of the present study also participated in the above expert group.

52 *i.e.*, the New Procurements Directives, although the issue of wider application of e-procurement was discussed in different acts preceding these Directives, *e.g.,* in the course of gathering of responses for *Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market* (2011). EU Commission Directorate General Internal Market and Services, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (2012), Single Market Act II, Brussels, 3.10.2012 COM(2012) 573 final *etc*.

53 Directive 2014/24/EU, Art. 36(1) – (6).

even information and documentation that fall outside the scope of the PPA. Thus, according to the proposal of CPCCOC, the weaknesses of the system are revealed and the patterns of corruption are covered in full. Perhaps in reaction to this proposal or in view of the trends set by the New Procurement Directives, in this case the Bulgarian legislator hastened to ensure even more 'publicity and transparency' regarding the procedures by introducing the requirement for the entire information to be compiled in the 'buyer's profile'. This legislative decision is ill-advised and burdensome, although inherently a good idea. The drawbacks of this decision have already been reviewed in previous chapters of this study, and the unequivocal conclusion was reached that this is not the proper approach towards detection of corrupt intent.

Active involvement of supervisory bodies - this aspect of the Solution Model aims to achieve better coordination between all supervisory bodies involved in *ex ante*, ongoing or *ex post* control of the individual stages of the procurement process. The CPCCOC established that regardless of the significant number of detected violations and complaints of corruption regarding public procurement procedures, the number of cases which actually reach the courtroom is negligible, while effective sentences are almost non-existent. Therefore, the CPCCOC considers it necessary to require active involvement of control authorities in the Solution Model. As was discussed in chapter 3, this is one of the key elements which could serve as a weapon against corruption in the country. Existing control bodies, along with the introduction of electronic platforms to facilitate access to information and to increase the distance in communication between contracting authorities, the election committee and the tenderers are the main ingredients for a successful campaign against corruption in the public spending process.

The last aspect outlined by the Solution Model is the creation of new ***legal and organisational rules*** to ensure its implementation and to help limit the opportunities for corruption schemes and maximize efficient use of public funds at legislative level,.

It is precisely in connection with implementation of these last four

aspects of the Solution Model that the CPCCOC drafted a proposal for changes in current legislation in the field of public procurement and for the establishment of two separate institutes – this idea being once again entirely borrowed from the German legal system in the field of public procurement: a) the so-called 'Pre-qualification' and b) the setting up of Central Public Procurement Services.

The two proposals comprise independent sets of measures, which, according to the CPCCOC, are essential for the success of the Solution Model, as they are prerequisites for the implementation of the technical solution and address those weaknesses which were either not covered or only partially covered by the technical solution. The proposals for amendments to legislation were submitted at the end of 2013 to the government of Plamen Oresharski.[54]

(a) ***Pre-qualification***[55]

The idea, in short, is that all documents, registrations and certifications, which are standard or typical for all participants from the relevant sector[56] are to be collected in a single register to significantly facilitate contracting authorities in verifying the eligibility of candidates. This will enable the identification and registration of the professional skills, abilities and eligibility of each potential contractor and will allow for 'the widest separation between the administrative and the specific and qualitative components of a public procurement procedure'.[57] This concept is supposed to result in significant alleviation of the administrative burden and a subsequent focus on the specific qualities of the participants, thus,

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[54] *Solution model for e-procurement B1 - Measures to improve the quality and increase the competence in the field of public procurement*.

[55] In Bulgaria this concept should actually be called 'pre-registration'. The German word used ('*Präqualifizierung*') has a different meaning in Bulgarian ('retraining') and therefore a more appropriate legal term has already been introduced; for the purposes of this work the term introduced and used by CPCCOC in the Solution Model will be used.

[56] *e.g.*, a business company registration in the Commercial Register; ISO certificates; proof that the company is not insolvent; construction certificates.

[57] Schloterrer, R. (2013). *First Report of CPCCOC on the draft Solution model in the area of public procurement*, abbreviated version V 1.52, Sofia: CPCCOC, p. 13.

expectedly, limiting the existing 'gateways to corruption' in the award process. Another indisputable advantage is that the input of such formal data is envisaged to run separately and independently of the call for proposals, and that once entered (and updated where necessary) this data can be used repeatedly for different public procurement procedures.[58]

To achieve the purposes of pre-qualification (following the model of German best practices) the idea is to set up two pre-qualification services based at the Ministry of Regional Development and Public Works: (a) a service for pre-qualification of companies and professionals in the field of public contracts for works, and (b) a service for pre-qualification of companies and professionals in the field of supplies, services and projects. These services will represent the interests of contracting authorities and contractors alike and will be made up of an equal number of members. The services will exercise control over pre-qualification activities and will cover pre-qualified companies and experts as well as proof of qualification in an electronic register on the 'e–Register' platform. Access to the register will be given to contracting authorities, applicants and other authorized persons. The internal structure and the bodies of these pre-qualification services have also been defined.

The expectations of the CPCCOC are that the unit providing these services can be established by a very large-scale change in national legislation: (i) adoption of a new PPA for electronic procurement in accordance with the proposals of the CPCCOC and amendments to secondary legislation; (ii) amendments to the legislation regulating the National Audit Office and the Public Financial Inspection and (iii) amendments to competition legislation.[59]

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[58] According to the *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market* (2011), EU Commission Directorate General Internal Market and Services, p. 14: 'The idea of a European-wide prequalification system finds some support from business but meets opposition from contracting authorities', but this refers to the administrative burden of contracting authorities and the extent to which such mode of operation will facilitate or further encumber them, rather than to the anti-corruption effect to be achieved by 'removing' formal documentation from the procedure itself.

[59] According to the Solution Model, p. 7.

(b) ***Central Public Procurement Services***

Again borrowed from the German model, these are to be services with qualified and trained staff to assist with the preparation of the formal documentation required for a public procurement award procedure and to review the technical specifications prior to publication of the call. According to CPCCOC data, in Europe '[i]n 2011 already 5.73% of the announced public procurement procedures were conducted by the centralized services'[60] and this centralized approach has a proven organisational and anti-corruption effect. The Solution Model envisages the establishment of at least five Central Public Procurement Services[61] with trained personnel to carry out the functions of committee members, to advise and train contracting authorities and to draft and verify the quality of tender documentation.

By design the Central Public Procurement Services are government entities which provide services and carry out their tasks independently of the contracting authority, and largely resemble the assigning functions of the central purchasing bodies.[62] According to the initial Solution Model they are entrusted with functions that closely resemble the rights and obligations of a contracting authority and, in some respects, even take over the functions of those authorities. For example, if the contract value reaches or exceeds the European procurement threshold, the Central Public Procurement Services will have the responsibility to announce a public procurement tender. Accordingly, regardless of the thresholds, in all product and service procurement tenders the Central Public Procurement Services are responsible for matters such as: publishing the calls; reviewing and, where necessary, finalizing tender documentation in consultation with the contracting authority; the statistical recording and transmission of data relating to the tender to the relevant institutions responsible under the law.

In addition to the above powers, the central public procurement

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60 Schlotterer, R. (2013). *First CPCCOC report on the Solution Model in Public Procurement Project, Summary V 1.52*, Sofia: CPCCOC, p. 14.

61 *Ibid*, p. 5.

62 As envisaged in the Procurement Directives and (advanced as a concept) in the New Procurement Directives.

services should undertake matters such as: technical responsibility for the set up and operation of electronic platforms in the field of public procurement; the preparation of tender documents and the conduct of public procurement procedures, including procurement and contracting; the preparation or implementation of high quality legal review of tender documentation, their publication and implementation or participation in the public procurement procedures up to contract award and conclusion, and assistance to contracting authorities with legal and expert advice on the selection of the most suitable public procurement procedure.

The setting up of such a centralized unit (with such extended functions and duties) once again suggests significant legislative changes, which, apart from the above legislative acts, include amendments to (or adoption of new) laws and regulations governing the activities of control authorities in public procurement.

This description of CPCCOC's Solution Model and the BORKOR concept demonstrates the ambitiousness of the project, which offers both a purely technical improvement in public procurement (in line with the trend towards e-procurement) and an overall change in the current legislation. From this perspective, any constructive criticism of CPCCOC's project should try to avoid one-sidedness but instead requires analysis of the various aspects of anti-corruption measures.

On the one hand, BORKOR proponents express rather bold predictions that:

> 'The BORKOR model is, at the moment, a key element of the fight against corruption and the prevention thereof in Bulgaria [...]. The importance of the model for the neighbouring countries lies in its universal applicability. With slight modifications, it is possible to use the structure of the model in each country'.[63]

[63] Hensgen, L. (2013). *Fight against corruption in the Danube region: A study of regional best practices*, Max Planck Foundation for International Peace and the Rule of Law, Sankt Augustin: Konrad Adenauer Stiftung, p. 44.

At the same time the EU report for 2013[64] is sceptical as to what has been accomplished so far:

> 'The anti-corruption project BORKOR, which was promoted as a major instrument to identify and address corruption risks, still shows no concrete results, in spite of the resources which have been devoted to the project. In the area of public procurement, a complex and ever changing legislative framework has made it even more difficult to create a culture of objectivity and rigour. Some business voices are losing confidence that a tide of manipulation of tenders can be stemmed'.[65]

The BORKOR project is actually an extremely thorough piece of work, with quite a number of advantages.

Firstly, it is the first ever attempt in Bulgaria to create not only a single unit focused on fighting corruption (*i.e.*, the CPCCOC), but also a comprehensive action programme, as well as an IT model to be followed.

Secondly, the CPCCOC offers the only Solution Model so far that provides specific measures aimed at detecting corruption loopholes in public procurement in the country, as well as their minimization.

The technical part, as the first aspect of the Solution Model, deserves admiration for the development of the six electronic platforms listed above. Ultimately, the PPA has also adopted (currently only a portion of) these proposals and this could help Bulgaria benefit from timely preparation for the shift to fully electronic procurement. In addition, diminishing the human factor and auditing of public procurement based on the BORKOR concept can represent a serious anti-corruption measure against the corruption schemes successfully developed so far.

The recording of corruption detection data and the active cooperation between supervisory authorities (as the second and third aspect of the Solution Model) also deserve a positive assessment. These two needs have repeatedly been identified, both by the organisations that analyse the level of corruption in the country (as shown in this chapter)

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64 *Report on Progress in Bulgaria under the Co-operation and Verification Mechanism* (2014), Brussels.

65 *Ibid*, p. 9.

and the EU (in its monitoring reports). The reasons for this were analysed in the present work as well, as part of the preceding chapter.

In terms of the legislative changes proposed and the setting up of 'pre-qualification' bodies and 'Central Public Procurement Services', the critical comments are strongly polarized:

Firstly, the so-called 'pre-qualification' or in fact pre-registration of public contract participants and candidates (together with the entire set of standard documents) is actually good practice, which has a positive impact in other European countries as well. Its implementation will significantly reduce the level of bureaucracy in an already sufficiently complicated public procurement system and will play a role in reducing corruption niches in the field. This is a good example of a constructive anti-corruption solution that is not based solely on the principles of improving transparency and publicity in the award of public procurement contracts: pre-qualification virtually eliminates the possibility of unjust exclusion and/or refusal to admit certain companies to participate in the award procedures; the possibility to exclude a candidate on formal or technical grounds through unconventional qualification requirements is also removed and eliminated.

The required large-scale legislative changes and the establishment of staff training and pre-qualification services will seriously delay the implementation of this measure. It would be more realistic to assume that this single unit (and the Central Public Procurement Services as well) should better be established tagged on to a new public procurement law transposing the New Procurement Directives. What is more, viewed from the prism of the new European legislation, the need for such an institution at local level will have to be reviewed, if the e-Certis system turns out to be of sufficient help to contracting authorities and participants due to its similar functions[66]. In any case, further fragmentary changes to the current PPA will not lead to the result expected by the CPCCOC, as such changes will not be able to meet the complex nature of the Solution Model. The current situation with the PPA is such that any attempt to adopt new regulations will further complicate the system (even if the ambitions are to

[66] Based on Directive 2014/24/EU, Art. 61.

create a lighter regime) and will 'leave as an effect on the subjects of the law the unpleasant consequences of excessive administrative burden, bureaucracy and possible discouragement and restriction of private initiative'.[67] For this reason, the Solution Model must once again be taken into account during the overall transposition of the New Procurement Directives and be reflected in the new law.

Secondly, the assessments regarding the establishment of Central Public Procurement Services are even more controversial. It is undisputable that centralized public procurement bodies have had a proven anti-corruption effect due to their role as mediators between contracting authorities and tenderers and supporting the needs of contracting authorities by largely eliminating the possibilities for 'covered arrangements'. This positive example is evident not only in Germany (as reviewed in details in chapter 6 of this research) but also in other countries where the levels of corruption have significantly dropped, such as in Hungary and Estonia for example. This premise is confirmed by the provisions of the New Procurement Directives which expand on the existence and functions of such centralized bodies. However, the analysis made in chapter 3 indicates that so far there is no serious political will in Bulgaria for the use of such centralized bodies, at least at the time when the new procurement package would be transposed. Time and practice will show whether after the new rules have been implemented in Bulgaria, central purchasing authorities will once again remain a sham, as could well be said of the current situation.

The institution thus proposed by the Solution Model, however, is entrusted with too many and overly chaotic functions which *de jure* make it obvious that the Central Public Procurement Services are in fact a type of public procurement contracting authority, although charged with further, atypical functions in addition to those delegated to the 'central purchasing body' in the PPA.[68] Therefore the key feature of these central

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[67] Daskalov, Ch. Brain-workshop.org, (2015). *Brain-Workshop*. [online] Available at: http://brain-workshop.org/index.php?option=com_content&view=article&id=231:2012-12-12-20-08-43&catid=29:politics&Itemid=37 and http://borkor.government.bg/bg/pubs/3/124 [Accessed 29.5.2015].

[68] Moreover, the now applicable PPA, Art. 8a stipulates for the existence of a Central Public Procurement Body, whose functions overlap a small portion of the functions of the Central Public Procurement Services, as proposed by CPCCOC, but is rather impracticable at the moment. See the comments in chapter 3.

services should be clearly distinguished: to support the activity of contracting authorities. In order to tailor the German model to the current Bulgarian legislative framework, the concept for these 'interim' Central Public Procurement Services must be defined far more unambiguously and their function clearly spelled out. The functions of the Central Public Procurement Services, as currently set out by the Solution Model are still vague and unduly general. Hence the problem of the changes at PPA level, which would have to be adopted before these centralized units could be set up. If the Central Public Procurement Services retain these broad powers, this will open a number of purely formal legal uncertainties: (i) under whose registry file will public procurement calls be published – that of the contracting authority or that of the Central Service or both? (ii) who will be responsible for the announcement of tender procedures and preparation of tender documentation – the contracting authority or the Central Service, (iii) who will carry out appropriateness control of the documentation - the contracting authority (as they do now) or the Central Services *etc., etc.*?

In the light of the above, the observation that legislative changes should be made at the level of a statutory act, as opposed to that of a small number of regulations applies with equal force in this context as well. The establishment of such centralized institutions will, indeed, discipline and support contracting authorities and might drastically reduce their corruption aspirations. Against the background of the current legislative framework, however, this seems impossible. The appropriate moment would, as mentioned above, be in the course of drafting of a new PPA, and harmonizing its provisions with the proposals contained in the New Procurement Directives. The necessity for an increase in the number of such centralized bodies is obvious and the expansion of their functions would have an indisputably restrictive effect on corruption in the sector. Taking account of the fact that the implementation and creation of such additional bodies will consume significant financial resources and staff training resources, this proposal appears, at least for the time being, hard to achieve. For this reason, and because of the ambiguous concept of the CPCCOC regarding the existence and organisation of these bodies, the proposal was perceived by the expert group under the project as rather short-sighted given the acute needs of the current situation of the public procurement system.

Despite the criticism and the failings, however, in the light of all the

theoretical works developed so far, and of Bulgaria's attempts to deal with corruption, the measures proposed by the CPCCOC and the BORKOR project are really '[a] quite promising aspect in the development of intervention models that include multiple measures. [...] The development of a comprehensive approach is certainly more promising than targeted measures that are only limited to the analysis of weaknesses within the affected institution'.[69] Unfortunately, similarly to the NAO, as was observed in chapter 3, the CPCCOC has also been reduced to a bargaining chip for the political class and an object of all sorts of different appetites of the short-lived governments of recent years. The operation of the CPCCOC and, indeed, its very existence, are stalling due to the frequent changes in management, the varying outlooks of politicians and the populist criticism claiming that the CPCCOC is a waste of resources. Thus this institution may, indeed, turn out to be incredibly expensive for society, given that its projects were subsidized up to a certain moment, but thereafter its operation suffered serious decline. Therefore the scepticism of the EU and the public seems justified for the time being.

In 2015 the government began work on a new draft law to create a single national body to combat corruption, which would absorb the CPCCOC and several other institutions currently in force (such as the Commission for Conflict of Interest). According to the new Anti-corruption Strategy '[a]nalyses show that the existing system of bodies with often redundant or inefficiently distributed anti-corruption powers does not provide the necessary tangible and specific results in the fight against corruption. Each institution creates its own anti-corruption unit, but the results of its work are not visible. There is a general feeling that the problem is constantly being shifted between institutions, the approach to its solution is overly bureaucratic and actions in that direction fail to demonstrate the necessary determination and finality.'[70] Yet this new strategy does not comment in detail on the particular manifestations of

[69] See *supra* note 60, p. 50.

[70] *Strategy for Prevention and Corruption in the Republic of Bulgaria 2015-2020* (2015). [online] Available at: http://www.government.bg/fce/001/0211/files/0804STRATEGY_anticorruption_april2015.pdf [Accessed 9.6.2015], p. 5.

corruption in public procurement, but merely states that measures should be taken to expand the preliminary and internal control in the field. It remains to be seen whether the latest purely political reshuffle and closing / opening of new institutions will once again take place or whether, finally, a truly effective and efficient body will be born, taking into account the positive guidelines laid down so far and leading the fight against corruption in the right direction.

5. CONCLUSION

The CSD, TIBG and CPCCOC have definitely made a positive contribution to the monitoring and studying of the peculiarities of national corruption patterns in public procurement carried out to date, the highlighting of problem areas in the procedure and the measures to be undertaken to minimize the negative effect of corruption.

Despite the very different direction of TIBG and CPCCOC, a parallel can nevertheless be drawn: (a) both projects started at about the same time and they both claim to offer an effective solution to reduce corruption in public procurement; (b) both projects use basically the best anti-corruption practices of the Republic of Germany (given the comparative nature of this study, these two projects, the analysis thereof, the public response to them and the results thereof are of particular interest to the author); and (c) since both projects are in their initial stage and/or their development is currently suspended, it is still difficult to identify any actual positive and practical results. The approach of the two institutions, however, is completely antipodal, with the TIBG clearly championing increased trust between participants in the procedure and sufficient transparency, and the CCCPOC model offering measures that are far more radical and practical. In any case, the reports and works of both organisations form an excellent basis for the development of an anti-corruption mechanism that could ‘save’ public procurement from the constant waste of national and EU funds.

It is noteworthy, however, that all of the prevention measures proposed so far, irrespective of whether they give priority to improving transparency or whether they are more constructive in their nature, still fail

to account for the individual characteristics of adverse national factors. Public administration in Bulgaria is not effective, it is deficient and poorly acquainted with European standards; the level of technical and professional qualification of individual contracting authorities is in most cases completely inadequate to address the proposed modern measures, and the legislative framework in the area of public procurement cannot be made fit for the purpose by further 'experiments': a radical change of legislation is needed.

> 'In the attempts towards a comprehensive and all-embracing legal framework to regulate public procurement processes, the state not only fails to achieve a tangible improvement in the efficiency of investment of public funds, but also comes to the point of outright absurdities'.[71]

In addition to the above, the proposed anti-corruption measures must take into account the fact that the economic situation of Bulgaria does not allow for the allocation of substantial funds for the implementation of complex projects that would not deliver their first results until after a few years, and that public attitudes are pessimistic and demand fast results and 'draconian measures'.

[71] See *supra* note 67.

Chapter 5

INFRINGEMENTS IN BULGARIAN PROCUREMENT PROCEDURES. CORRUPTION LOOPHOLES AND PRACTICES

'In the 2013 Eurobarometer business survey, 58% of Bulgarian respondents said that corruption had prevented them from winning a public tender or procurement contract over the last three years.'

The First EU Anticorruption Report 2014

This chapter examines the specific manifestations of corruption practices and the corruption mechanisms in the award and execution of public procurements in Bulgaria. It constitutes the core of this work (preceding the comparison part), as far as Bulgaria is concerned, as it not only highlights the main types of infringements, but also the various problems related to their detection and prevention. The analysis aims to demonstrate the *de facto* absence of a (theoretical) link between transparency in the award and execution of public procurements and the reduction of corruption in the sector.

The different types of infringements detected by appellate and control authorities are identified, but only those, which set into motion certain corruption mechanisms are discussed. The main analyses carried out and works compiled in Bulgaria over the last decade on the topic of corruption in public contracts are taken into consideration, as are the annual monitoring reports prepared by Bulgarian institutions and at EU level.

The methodology applied is as follows:

(i) description of infringed PPA provisions and EU law (where applicable), taking into account any changes in the conclusions drawn which may be required following transposition of the New Procurement Directives;

(ii) description of the infringement itself;

(iii) a brief note on whether the reviewed infringement violates transparency rules; and

(iv) the types of corruption loopholes opened by these unlawful acts.

The infringement is examined separately from the analysis of the specific corruption possibilities it opens, because an infringement does not necessarily mean an instance of corruption and *vice versa*: 'Even when an accusation of corruption surfaces, this provides no certainty that the case is actually corrupt. One must take into account false accusations, confusion of terminology [...] and other grounds before accepting something to be true.'[1]

Anyhow, no attempt is made to provide a detailed description of specific actions per type of procedure, nor attempts at a comprehensive review of existing legislative measures aimed at limiting infringements. The main parallel drawn is between the numerous existing legal provisions regulating transparency of the procedure, as reviewed in chapter 1, and the different types of infringements described below and how they are affected, or, respectively, unaffected by the level of transparency provided.

Infringements are classified in the context of the four phases of the public procurement procedure, as set out in chapter 2 – *i.e.*, the Choice of Object Phase, the Announcement Phase, the Procedure Conduct Phase and the Contract Implementation Phase.[2] Specific procedures are only examined where this is essential to make a particular point.

No claim is made that the full catalogue of infringements has been

[1] Wensink, W., Maarten de Vet, J. and others (2013). *Identifying and Reducing Corruption in Public Procurement in the EU*, Brussels: PwC, Ecorys, with support of Utrecht University, p. 58.

[2] For a more detailed description of the method of classification, see chapter 2.

covered, because, given the increasing resourcefulness of contracting authorities (and their patrons) and of future contractors, this would be a hollow claim. '[I]ngenuity applies in full force for state administration which constantly identifies new 'loopholes' in legislation'.[3] The purpose of this chapter is to cover the most flagrant and repeated infringements, especially those which remain without repercussions, and thus to outline the limited connection between what has been committed and the demonstration of public, transparent conduct in the award of public procurements.

In the field of public procurement, 'it is the well-structured networks for targeted investments in politics that predominate rather than individual acts of random people from the lower tiers of authority taking advantage of lax oversight by their superiors.'[4] Despite this, and although the differentiation made by some authors between 'petty' corruption (committed by low-ranking employees in return for minor rewards or services promised by a future contractor) and 'grand' corruption (committed by higher-ranking officials, often acting as contracting authorities themselves, and linked to considerable financial resources)[5] is not without problems, for the purposes of this chapter it would be useful to adopt this provisional differentiation. The objective is to identify, on the one hand, infringements aimed at significant financial abuse (generally involving substantial administrative capacity), and, on the other hand, to point out minor instances of corruption the repetitive occurrence and gradual accumulation of which also lead to a similar loss of resources.

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[3] Lazarov, V., representative of the National Association of Municipal Employees in Bulgaria in an interview, dated 17.10.2008 - *Corruption in public procurement costs taxpayers an estimated 1.3 billion leva*, Mediapool.bg, (2008). [online] Available at: http://www.mediapool.bg/koruptsiyata-v-obshtestvenite-porachki-kostva-13-mlrd-leva-na-danakoplattsite-news144808.html. [Accessed 29.5.2015].

[4] Pashev, K., Dyulgerov, A. and Kaschiev, G. (2006). *Corruption in Public Procurement – Risks and Reform Policies*. Sofia: Center for the Study of Democracy, p. 15.

[5] In this sense see: Transparency International [online] Available at: http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/ [Accessed 29.5.2015]; Dahlström, C. (2012). *Bureaucracy and the different cures for grand and petty corruption*, Gothenburg: University of Gothenburg, QoG Working Paper Series 2011:20 and Stoychev, S. (2007). *Corruption Violations in Public Procurement in Bulgaria*. Sofia: Transparency International Bulgaria *etc*.

1. SOME STATISTICS

As is evident from the analysis carried out in previous chapters, measuring corruption or forcing corruption in specific quantitative and qualitative dimensions is exceedingly difficult, especially in terms of its manifestations in the field of public procurement. The achievements of international and national organisations focused on combating corruption have already been noted; it has also been established that some of them do offer a methodology to quantify the level of corruption (mainly subjectively), but their indices fail to account for corruption at higher levels of authority which is precisely the type most often associated with public procurement.[6] It has also been observed that control and appellate authorities in Bulgaria have the right, albeit curtailed to an unsatisfactory minimum, to carry out control in terms of appropriateness (effectiveness) of implemented public contracts; their reports also provide an indication for the most common infringements in the field. The main studies in the field have already been highlighted in chapter 4, *i.e.* those which have, in recent years, attempted to classify infringements in the field of public procurement and have submitted monitoring reports on the topic as well.

In addition to using the information derived from the above sources and with view of presenting a 'snapshot' of infringements and the corruption mechanisms employed in the field of public procurement in Bulgaria, the most recently available statistical information (for 2013 and 2014) is used. Since at the time of writing, the report of the PPAgency for 2014 has not yet been approved and published, the PPAgency's report for 2013 and market data in the field of public procurement for 2014, published on the official website of the PPAgency are used in order to illustrate the volume of public procurement in Bulgaria and the application of different procedures. The NAO reports for the past years are also taken into consideration for the purposes of this research.

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[6] In addition to the TI and CSD indices discussed in previous chapters, the following should also be mentioned for the sake of completeness: the Global Competitiveness Report, the World Competitiveness Yearbook, the Institutional Profiles Database and the research of the World Bank Business Environment and Enterprise Performance Survey, as well as specific databases which contain, in their studies, issues dedicated to public procurements *etc*.

According to information provided by the PPAgency[7] the total number of public procurement procedures announced in 2014 was 11,881, and the number of public contracts concluded totalled 24,872. The value of contracts concluded in 2014 exceeds BGN 7530 bln. (approx. EUR 3,850 bln.), which is more than 15 percent of Bulgaria's GDP for 2014, equal to almost BGN 23 bln. (approx. EUR 12 bln.).[8] The average contract value for 2013 slightly exceeds BGN 350,000 (approx. EUR 178,645).[9]

The number of contractors for 2014 reaches 22,680 and of contracting authorities - 5,674. These figures illustrate the circle of market players involved in the distribution of budget money (including European funds). Naturally, the award of contracts affects the economic activities of many other entities – subcontractors, suppliers, organisations involved in testing, certification and control activities *etc*. The allocation of announced procurements in terms of subject matter for 2014 was: construction works – 2,089, supplies – 5,309, and services – 4,483.

The tables and diagrams below demonstrate the above data and compare it to data from the last few years in order to reveal the positive progression in terms of both the number of public procurements and the number of concluded contracts.

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7 Rop3-app1.aop.bg, [online] Available at: http://rop3-app1.aop.bg:7778 [Accessed 29.5.2015].

8 As per information of the Bulgaria's National Statistical Institute (Nsi.bg, *Macroeconomic statistics / National statistical institute*. [online] Available at: http://www.nsi.bg/en/content/11240/macroeconomic-statistics [Accessed 29.5.2015], in the third quarter of 2014 Bulgaria's GDP at current prices amounts to BGN 22.838 bln. (approx. EUR 11,68 bln.). In Euro terms the GDP is EUR 11.677 bln. or EUR 1,616 per person.

9 2014 data has not yet been published by the PPAgency.

Fig. 1 Number of public procurement procedures

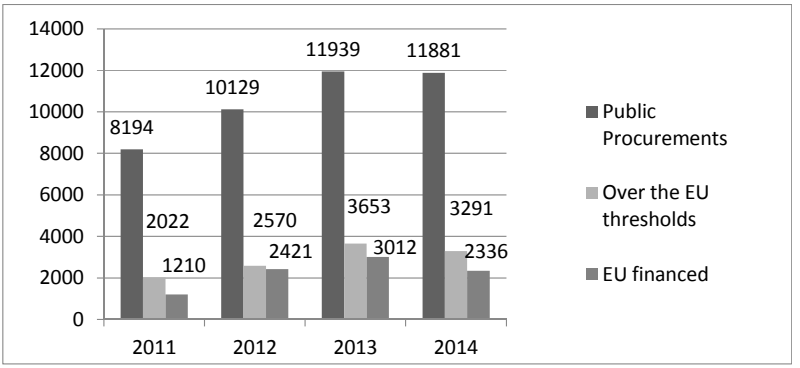


Fig. 2. Public procurements by subject matter – deliveries, services, construction works

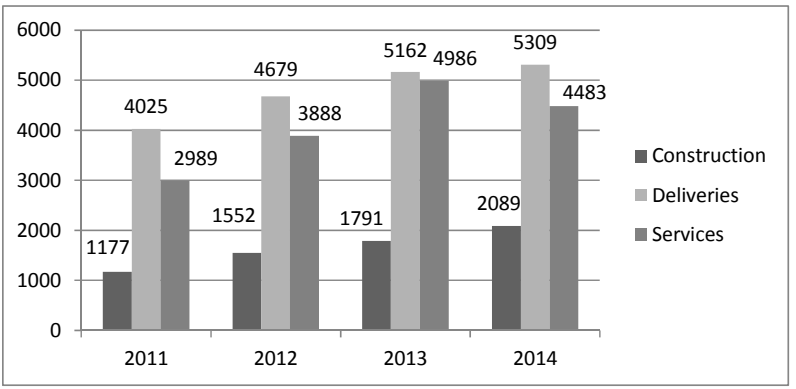


Fig. 3. Number of contracts concluded and their respective value

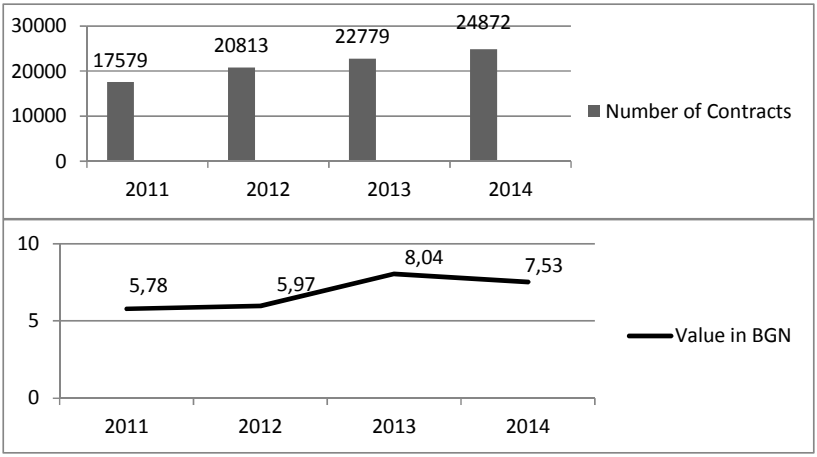
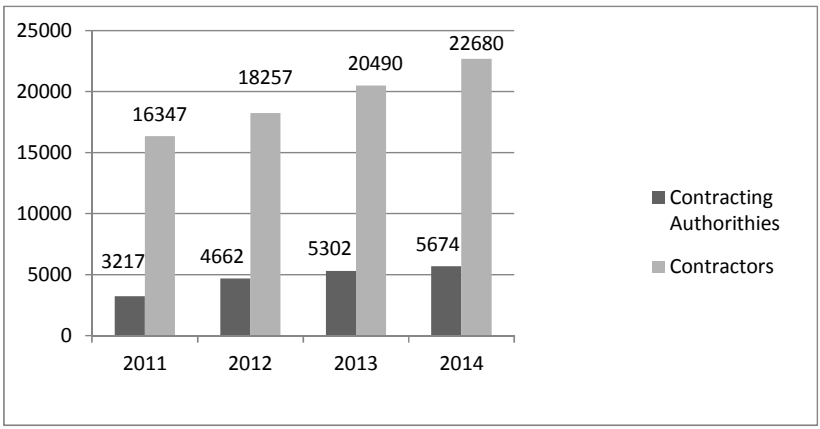


Fig. 4. Number of Contracting Authorities and Contractors



In terms of infringements as a percentage of the total number of procedures and/or contracts there is, regrettably, no reliable statistical data. This significantly hinders the identification of realistic parameters and the arrival at a financial expression of loss arising from misuse of public funds.

In its annual reports, the PFIA provides statistical information on infringements identified by PFIA, which is often used by the media and several public organisations to summarize their conclusions in the field of public procurements. This information does not, however, fully reflect the actual situation, especially existing corruption mechanisms, for the following reasons:

Firstly, PFIA statistics fail to take into account the number of infringements detected by the PPAgency and the number of penal rulings which are thereafter appealed and annulled by the court (which, in reality means that even if established by the PFIA, penal rulings are annulled by the judicial body).

Secondly, these statistics cover an average of 2000-3000 cases *per annum* (due to, among other issues, lack of sufficient human and financial resources), of which only about 1/3 fall within the scope of the annual PFIA plan while the remaining number of cases refer to different previous years, *i.e.*, the representative sample for a single year is too small to be compared to the total number of procedures and/or contracts as provided by the PPAgency;

Thirdly, the larger portion of infringements covered by PFIA statistics relate to municipalities (in their capacity of contracting authorities); these tend to be more easily detectable and demonstrable by means of available documentation and are usually classified as 'petty' corruption;

Finally, a significant percentage of detected infringements falls under the category of 'purely formal' and procedural infringements without financial effect.

Nevertheless, the data contained in PFIA's report on public procurements for 2013[10] is a useful general guideline and reference point for further comments (this data is also used for a portion of the

[10] *Report on the activity of the Public Financial Inspection Agency for 2013* (2014), Sofia.

infringements analysed below):

According to the PFIA report, 478 financial inspections and audits were completed in 2013, of which 202 were carried out in performance of PFIA's annual plan and 276 were carried out outside this plan (*i.e.*, in response to incoming signals, decisions of the prosecutor's office and other requests). Altogether, considering assigned requests and completed inspections and audits, PFIA was approached for a total of 541 violations. The control activity confirmed 330 violations (61%), failed to confirm 211 (39%) and established an additional 3,312 violations.[11] A total of 2,484[12] cases were reviewed under those audits, involving the disbursement of public procurement funds in the amount of BGN 2,545,272,457 (approx. EUR 1,301,393,957). Of the total number of investigated procedures, infringements were detected in 1,376 of the cases, to the value of BGN 1,795,562,248 (approx. EUR 918,070,482), *i.e.*, in 55% of the total number of public procurements inspected. The infringements detected in the field of public procurements can, according to their nature, be classified as follows:

(i) Breaches of law in the field of public procurement having a financial impact and resulting in violation of PPA principles of publicity and transparency, free and fair competition, equality and non-discrimination, were identified in 777 procurements, *i.e.*, 31% of the total procurements investigated; and

(ii) Breaches of law in the field of public procurement of procedural nature were identified in 599 procedures, *i.e.*, 24% of the total

[11] Confirmed violations and those additionally detected involve damages resulting from faults, violations of the public procurement award and implementation regime, violation of legislation regulating budgetary, financial, economic accounting activities *etc.*

[12] The 2,484 public procurements are distributed as follows: 434 public procurements for a total of BGN 942,343,393 (*approx*. EUR 481,819,917) for municipalities; 39 procurements, in the value of BGN 512,040 (*approx*. EUR 261,806) for other municipal budget spending authorities; 94 procurements, in the value of BGN 227,546,361 (*approx*. EUR 116,344,391) for ministries; 182 procurements in the value of BGN 126,190,921 (*approx*. EUR 64,521,383) for other state budget spending authorities; 800 procurements in the value of BGN 800,575,377 (*approx*. EUR 409,333,969) for commercial undertakings with public (state) participation in capital; 471 procurements in the value of BGN 202,882,916 (*approx*. EUR 103,733,979) for commercial undertakings with public (municipal) participation in capital and 464 procurements in the value of BGN 245,221,449 (*approx*. EUR 125,381,659) for other contracting authorities.

procurements investigated.

The above data, may, understandably, give rise to numerous and various speculations but these get in the way of the objectiveness and comprehensiveness of the data. In the particular case of analysing corruption in public procurements in the absence of complete statistical data and a clear system of indicators (restrictions, to which the majority of EU states are no strangers), such speculations are highly inappropriate, although there is no doubt about the worrying level of corruption in the sector. Pashev has rightly opined that the imbalance between the different groups of indicators and data sources could pose risks to monitoring activities. These risks will inevitably diminish the effectiveness of anti-corruption policies:

> 'The first risk is to resort to monitoring of processes with a focus on input resources (input indicators) at the expense of monitoring of end results. The second risk is similar: a tendency to audit specific procedures […]. The third risk refers to the other extreme: focusing on public perceptions in order to evaluate corruption […].'[13]

Despite the problems outlined above, data from reports prepared by control bodies significantly contribute to the description of different infringements, their specific manifestations, prevalence and their classification.

[13] Pashev, K. (2009). *Controlling corruption in public procurement: Indicators for assessing policy impact*, Sofia: Governance Monitoring Association, p. 17.

2. TYPES OF INFRINGEMENTS AND INCIDENTS OF CORRUPTION

2.1. CHOICE OF OBJECT PHASE[14]

Disbursement of public funds without regard to legal rules

Which legal provisions are infringed?: The applicable legal provisions and the main principles for conduction of public procurements are completely ignored, both in terms of national (more specifically Article 8 of PPA)[15] and EU law.[16]

What does the infringement involve?: These are cases where an infringement of the main texts of PPA has been established, whereby the subject-matter of the procedure, its value or the characteristics of the contracting authority have not been taken into account, and, respectively, no procedure is conducted. In such cases the contracting authority directly proceeds with conclusion of the transaction with the selected tenderer; disbursed expenses are not made public in any way and there is no control over the quality of execution and the characteristics of the selected tenderer. Such practice constitutes a gross violation of the law which, naturally, leads to lack of publicity and transparency and demonstrates obvious corrupt intent.

This practice is usually adopted by 'smaller' contracting authorities whose actions are guided by (private) corrupt motives. Signals and allegations usually point at small municipalities, health and educational facilities, regional institutions. Although they act as contracting authorities pursuant to PPA, they conclude contracts with selected companies without

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[14] This includes cases of negotiated procedure without prior publication of contract notice.

[15] PPA, Art. 8: 'Contracting authorities shall be obligated to conduct a public procurement award procedure where the grounds provided for in the law exist'.

[16] The Public Procurement Directives and the New Procurement Directives set out the fundamental concept for regulation of this type of negotiation – 'for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition' (Directive 2014/24/EU, preamble (1)).

organising a procedure of any kind. This type of infringement of public procurement law is considered by the PFIA as one of the most severe, as it not only infringes publicity and transparency requirements but also restricts free and fair competition, equality and non-discrimination. Such infringements raise the question of whether public spending is sufficiently economical, effective and efficient. According to PFIA's data, a total of 522 cases were reported for 2013, with the respective contracts concluded within preceding reporting periods amounting to the total value of BGN 269,156,733 (approx. EUR 137,618,228),[17] without proper procedures for the award of the procurement despite the presence of compelling legitimate grounds. The prevalence of this type of direct infringement involving the conclusion of public supply contracts in the absence of a proper tendering process continues to be high, although it has long been identified both by control bodies and by sociologists and analysts. Naturally, this approach is rarely used for the purposes of 'grand' corruption precisely because of the high level of detectability.

Although this type of infringement affects mainly small-scale contracting authorities, the cumulative effect is by no means negligible. In other words, almost one-fifth of the value of all infringements detected is the result of the deliberate failure to observe legal rules.[18]

> 'Even if we allow that the rate of detection within this market segment is much higher due to the direct nature of the infringement and the relative absence of political protection in contrast with large procurements, the relative share of direct infringements in the total volume of damages (including those that remain undetected) nevertheless appears significant. This is also an indication for the insufficient deterrent effect of sanctions as opposed to the benefits derived from acts of

[17] *Report on the activity of the Public Financial Inspection Agency for 2013* (2014), Sofia: PFIA, p.10.

[18] Against the backdrop of this analysis, the new National Audit Office Act (*Закон за Сметната Палата*, promulgated SG 12/13.2.2015, as amended) provides in Art. 54(2) that the Audit Office will have the discretion to determine the frequency of audits carried out on municipalities with a budget below BGN 10 mln. (approx. EUR 5 mln.) or whether to audit those municipalities on the basis of risk assessments. This would mean that the control of around 160 small municipalities will be exercised on a highly subjective basis.

corruption.'[19]

Are transparency rules breached?: Yes, because the transaction is concluded without proper promulgation as required by law, in disregard of the other (imperative) rules of the PPA and in the absence of a healthy competitive environment.

What corruption loopholes are opened?: The contracting authority concludes the transaction, at its own discretion, with its favourite contractor, in violation of competition rules and proceeds to spend public funds which have not been duly evaluated and controlled as provided by law. In the absence of a procedure, the contracting authority pays for the respective service/supplies/works on the basis of an ordinary commercial transaction, and, driven by corrupt motives, deprives itself of the opportunity to assess implementation quality. Both the contracting authority and the contractor thus receive undue benefit, by unlawfully distributing budget funds between themselves. Quite often, in the case of such infringements, the constituent elements of the offence include (in addition to abuse of power) also bribery/kickback.

Splitting/Subdividing public procurements with the purpose of evading the law

Which legal provisions are breached?: Article 15, para 3 - 6[20] and

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[19] See *supra* note 4, p. 30.

[20] PPA, Art. 15(3), (4), (5) & (6) '(3) For the purpose of calculating the value of a public procurement, account shall be taken of all payments, exclusive of value added tax, to the supplier, contractor or service provider of the public procurement, including any form of options provided for and any renewal of the service or work under Item […].

(4) Where a public procurement is subdivided into several lots, each one the subject of a contract, the value of the procurement shall equal the sum total of the values of all lots. Where the aggregate value of the lots is equal to or exceeds the threshold values […], the procedure applicable to the total value of the procurement shall be complied with upon award of the procurement for each lot.

(5) The selection of a method for calculation of the public procurement contract value may not be used for the purpose of circumventing the application of this act.

(6) It shall be inadmissible to split up a public procurement with the intention of circumventing the application of this act, even in stage-by-stage construction, where the completed stage cannot be granted a use permit as a self-contained building work'.

Article 8, para 2 of PPA;[21] Article 9 (3) of Directive 2004/18/EC;[22] Article 17 (2) of Directive 2004/17/EC.[23] [24] There is a similar prohibition in the New Procurement Directives,[25] although with a somewhat different undertone, as will be discussed further below.

What is the essence of infringement?: The construction works, supplies or services required by a specific administration are subdivided by the contracting authority into sections so that each section falls below the thresholds (both national and European) for a tendering procedure. The contracting authority then proceeds with either (a) direct negotiation or (b) a simplified award procedure by means of public call for tenders.[26] Despite this split, the different sections are interconnected and comprise elements of one and the same procurement; the subdivision is performed solely with the aim of deliberate evasion of national rules for the organisation of public procurements, *i.e.*, to allow for a simplified award process (or no process at all) rather than the one required in accordance with the total value of the procurement.

Not all cases of subdivision are deemed to be an infringement but only those cases in which deliberate behaviour (intent) of the contracting

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[21] PPA, Art. 9(2): 'Contracting authorities or officials authorized thereby shall organise and conduct the public procurement award procedures and shall conclude public procurement contracts. Authorization may not be used to split public procurements for the purpose of circumventing the application of the law'.

[22] Directive 2004/18/EC, Art. 9(3): 'No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive'.

[23] Directive 2004/17/EC, Art. 1(2): 'Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts'.

[24] The Procurement Directives use the terms 'subdivision' and 'splitting', respectively, with the prohibition contained therein referring mainly to works contracts because, in reality, the possibility for procurement splitting is most frequent in this sector. The Bulgarian legislator is much stricter in this case, with the restriction referring to all procurement types.

[25] Directive 2014/24/EU, Art. 5(3) and Directive 2014/25/EU, Art. 16(3) are identically worded – 'The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons'.

[26] Contracting authorities are not required to conduct the procedures set under PPA but are obliged to apply the simplified terms or the procedures with public call for tenders taking into consideration the thresholds set out in PPA, Art. 14(3) & (4).

authority is evident and aimed at circumvention of the law.[27] In the practice of control bodies, proving intent in this type of infringement is very difficult, hence a percentage of these violations remain undetected. Nevertheless, there are some very specific manifestations which indicate intent in the behaviour of the contracting authority.[28]

Currently, *NAO considers the following cases to be an infringement*: cases in which a single independent contracting authority assigns, within the same calendar year, several prearranged identical or similar activities, and where instead of the standard procedure corresponding to their cumulative value, the relevant supplier, contractor or service provider is selected through a lighter regime. For NAO, splitting of a public procurement is evident where there is not only similarity between the activities assigned, but also pre-planning of the needs. For this reason identical activities need not be aggregated if the need for one of the activities was planned in advance.[29] Where the need for the other one arose incidentally, for reasons beyond the control of the contracting authority, there are no grounds for unification of the procedures and of their estimated value, accordingly.[30]

The practice adopted by the PFIA in this respect, however, is radically different. In the opinion of PFIA's financial inspectors and in accordance with its policy, the contracting authority is obliged to consolidate incidental, newly arising needs, with already contracted and planned activities, and the stricter regime of award should be applied with respect to such newly arisen needs as well (although they have not been

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[27] When a specific public procurement has been split but each of its parts is awarded by means of a procedure analogous to the one corresponding to the total value of the public procurement, no infringement is deemed to have taken place as the prohibited result – circumvention of the law has not been achieved.

[28] For example, the conclusion of numerous contracts with identical or similar subject-matter at the same date, and sometimes even with the same contractor.

[29] In this respect, see also Katsarova, M. (2010). *Most common infringements in the award of public procurements established by National Audit Office*. [online] Available at: http://212.122.184.197/files/_bg/statia-Petev-naru6enia_2010.doc [Accessed 29.5.2015].

[30] *e.g.*, the repair of a specific piece of professional equipment used by the contracting authority was planned but, following the award of the contract for the repairs, there was an accident at some later stage causing the break-down of another piece of equipment, also used by the contracting authority for its specific needs. The need which arose later would not be accumulated, according to NAO's practice.

expected, nor could have been foreseen by the contracting authority).

This collision between control bodies causes serious difficulties for contracting authorities and significantly increases the percentage of infringements of this type, which, in turn, impedes the objective assessment of both risk and corruption intent in such cases.

Splitting of public procurements currently continues to be one of the common types of infringement, although the NAO believes that the number of these violations is decreasing.[31] Yet, the practice reveals that the main means for such subdivision are (a) authorization of officials, (b) division into lots and (c) phased works.

(a) *Authorization* in the field of public procurement in Bulgaria is expressly permitted and is especially suitable for contracting authorities with a complex organisational structure.

Contracting authorities, however, often fail to consider the fact that authorized entities do not act in the capacity of independent contracting authorities and hence the value of contracts with an identical or similar subject awarded separately by such authorised entities needs to be consolidated. Although the PPA expressly prohibits the use of authorisation for splitting of public procurements for the purpose of circumventing the law, NAO practice reveals that authorised entities usually apply an award approach depending on the needs of the unit under their direct control, and not on the total value of the procurement for the contracting authority as a whole. This inevitably results in circumvention of the law because a lighter regime than the one required is applied.[32]

(b) The other method for splitting of public procurements is through

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[31] According to *Activity Report of the Audit Office of the Republic of Bulgaria for the period 11.6.2014 - 20.1.2015*. (2015). Sofia: NAO.

[32] A legal method for authorized persons to award a public procurement without infringing the ban on splitting is for each authorized official to apply such an award regime as corresponds to the total value of the public procurement for the respective contracting authority as a whole. Thus, where ten authorized persons need to award public procurements for the supply of stationery and the total value of this activity for the entire structure of the contracting authority exceeds the thresholds set out by the PPA, then each authorized person must initiate a procedure pursuant to the PPA in order to satisfy the needs of the unit under its control. This is the only way in which the law will not be circumvented.

division into lots.[33]

It is wrongly assumed by some contracting authorities that an activity which can be regarded as a separate lot, within the scope of one public procurement, can be treated as an independent public procurement, and hence awarded in accordance with a procedure corresponding to its individual value. In fact, contracting authorities overlook the fundamental characteristic of the lot, namely that it is an integral part of the project scope, which is systematically linked to its remaining parts. The estimated value of a project split into lots, which serves as basis for determination of the relevant award regime, is calculated as the sum of the values of the individual lots. In order to prevent the attempts of contracting authorities to circumvent the law by treating lots as individual contracts, the legislator has expressly specified that where the total sum exceeds the threshold for a mandatory procedure, then the rules applicable to the total value of the procurement must apply to each individual lot as well.

In view of the policies in public procurement, introduced with the New Procurement Directives, European trends are towards encouraging the splitting into lots with view of supporting the entry of more small and medium enterprises (SME) in the field. Splitting will, of course, have to be substantiated and not result in circumvention of the rules. The logic, from now on, will be the opposite to the hitherto accepted one – contracting authorities will have to justify their decision not to split the procurement into lots, while national legislation will possibly even oblige contracting authorities to split procurements. It is still too early to predict which option the Bulgarian legislator will choose to adopt when transposing the new procurement package. However, practice reveals that determination of the estimate values of procurements and the summing up of the different lots often results in errors, even unintentional ones (especially so, given the above difference in the practices of NAO and PFIA). Hence it is difficult to say whether or not this new right/obligation of the contracting authority will result in even greater chaos in the award process and open up wider opportunities for 'adjusting' of the lots with corrupt intent. Further,

[33] §1, it. 16 from PPA – ''*Lot*' shall be such a part of the subject matter of the public procurement which, even though can be treated as a self-contained subject matter of public procurement, is systemically related to the other lots in which the subject matter of the public procurement is subdivided.'

potential conflict of interests and/or relatedness between the individual contractors (*e.g.*, SME's, as desired by the EU legislator) will have to be monitored much more closely since a frequent corrupt practice is the winning of the contract by seemingly independent companies which turn out to be related parties or parties involved in concerted practices (bid rigging),[34] as will be analysed further below.

(c) In their attempt to justify the absence of connection between the separate lots in a project, especially in the field of construction works, contracting authorities refer to the PPA which provides that, in the event of stage-by-stage or *phase construction*, the separate stages can be awarded independently if each stage can be granted a separate use permit.

> 'This provision is wrongly assumed to apply to any type of construction works and not to stage-by-stage construction only and results in circumvention of the law by means of splitting of public procurements. Such cases are, almost without exception, regarded by NAO authorities as infringements.'[35]

It should be noted here that the Bulgarian PPA has omitted (for reasons which are not sufficiently clear) to transpose Article 9(3)(b) of Directive 2004/18/EC and the analogous Article 17(6)(b) of Directive 2004/18/EC, both of which provide as follows: 'However, the contracting authorities may waive such application in respect of lots the estimated value of which net of VAT is less than EUR 80,000, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole'. This lighter regime is, consequently, not applied, while at the same time the practice adopted by the different control bodies in terms of aggregation of lots is exceedingly contradictory, which impedes statistical studies and the identification of cases of corrupt intent in the award of split public procurements to a preferred supplier, contractor or service provider.

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[34] In these cases the CPC may act upon its own initiative, following an alert, to detect the corrupt practice employed by participants.

[35] Katsarova, M. (2010). *Most common infringements in the award of public procurements established by National Audit Office*. [online] Available at: http://212.122.184.197/files/_bg/statia-Petev-naru6enia_2010.doc [Accessed 29.5.2015], p. 3.

Are transparency rules breached?: (a) Yes, in cases where splitting is indeed carried out for the purpose of circumventing the law. The relevant sections of the procurement are then awarded by means of direct negotiation in the absence of any publicity whatsoever; and (b) No, where the corruption scheme is far more complicated and the idea is not to circumvent award rules but to exploit them in order to allocate lots to 'selected' candidates.[36] In this case PPA transparency rules are observed strictly and the corruption scheme is not as easy to detect.

What corruption loopholes are opened?: Splitting of procurements opens up the possibility for different sections of the procurement to be awarded to freely selected tenderers which have entered into a corrupt relationship with the contracting authority (in most cases, on the basis of bribery). A relatively high percentage of detection is typical for this type of infringement as well. In this light, the splitting of public procurements is predominantly used as a method of corruption by municipalities and also for public procurements of a relatively low value (*i.e.*, 'petty' corruption). In addition, the unsubstantiated splitting into lots, as a subcategory of this infringement (deserving comment also with view of the New Procurement Directives), opens upon corruption opportunities for coordination of competition-restricting activities not only with the contracting authority, but also between the different tenderers.

Unsubstantiated implementation of a negotiated procedure without prior publication of a contract notice

Which legal provisions are breached?: Article 90, par. 1 of PPA;[37]

[36] An opportunity which will come to the foreground with the introduction of the New Procurement Directives, as was noted herein above.

[37] PPA, Art. 90: '(1) Contracting authorities may award a public procurement by negotiated procedure without publication of a contract notice solely where: 1. the open or restricted procedure has been terminated [...] and the conditions as initially announced are not substantially changed; 2. in the cases [where] contracting authorities invite only the participants who or which have submitted tenders and meet the requirements as indicated in the notice of the open or restricted procedure or the competitive dialogue, to participate in the procedure; 3. the award of the public procurement to another party would lead to infringement of copyrights or other intellectual property rights, or of exclusive rights accruing by virtue of a statute or of an administrative act; 4. a need has arisen to take urgent action, brought about by the occurrence of an event of extraordinary nature the consequences of which cannot be overcome in observance of the time limits for conduct of an open or restricted procedure or negotiated procedure

Article 31 of Directive 2004/18/EC.[38] The New Procurement Directives also include similar provisions.[39] The amendment in the new rules goes in a positive direction, as this type of infringement is obviously common for most Member States and the European legislator has taken restrictive measures, within the new legislative framework, which severely limit the

with publication of prior notice; 5. the goods which are the subject matter of procurement are manufactured purely for the purpose of research, experiment, study or development, and this provision does not extend to quantity production to establish commercial viability or to recover research and development costs […]' *etc.*

[38] Directive 2004/18/EC, Art. 31: 'Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases: (1) for public works contracts, public supply contracts and public service contracts: (a) when no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests; (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator; (c) insofar as is strictly necessary when, for reasons of *extreme urgency brought about by events unforeseeable* [emphasis added] by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Art. 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority […]' *etc.*

[39] Directive 2014/24/EU, Art. 32 and Directive 2014/25/EU, Art. 50 set out the possible cases where negotiated procedures without prior publication can be used; these are very limited and are consistent with the desire of the European legislator outlined in the preamble to Directive 2014/24/EU: 'In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

Contracting authorities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting authority or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, they should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural products, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.'

cases where a negotiated procedure without prior publication/prior call for competition is possible. This approach is expected to have a positive effect on this type of infringements by restricting the opportunities to use the negotiated procedure without prior publication for corrupt purposes.

What does the infringement involve?: A negotiated procedure without prior publication pursuant to PPA cannot be freely adopted and applied by contracting authorities at their own discretion as it involves limited application and can only be lawfully applied in cases where the imperatively enumerated conditions of the PPA are satisfied (as cited above).

However, controlling bodies continue to come across numerous illegal negotiated procedures. In most cases the provisions of Article 90, para 1, item 4 of the PPA are applied incorrectly or speculatively, namely the option for a negotiated procedure where, due to the need to take 'urgent action brought about by the occurrence of an event of extraordinary nature'[40] the time limits for conduct of an open procedure under PPA cannot be complied with. In most cases the need for such award is not a direct and immediate effect of an extraordinary event, but is rather caused by inadequate planning or deliberate postponing of the procedure in order to justify negotiation without prior publication at the last possible moment.

Procedures where the concluded contract will be implemented over an extended period of time are also regarded as unlawful negotiated procedures substantiated on the basis of the urgency factor, given that the 'urgent' needs of the contracting authority for the resolution of which such an opaque procedure has been applied will not be met in the immediate future but, instead, after an extended period of time. A similar infringement (motivated by contracting authorities in a similar manner) is observed in cases where the competitive dialogue is selected instead of a negotiated procedure without prior notice. This approach, however, is rather more

[40] §1, item 8 of PPA: ''*Event of an extraordinary nature*' shall be circumstances brought about by events unforeseeable for the contracting authority, such as a natural disaster, accident or catastrophe, as well as any other event which immediately endangers human life and health or the environment, or which may significantly hinder or obstruct the normal execution of statutory obligations of the contracting authority. An event of an extraordinary nature is also the resulting danger to national security, national defence, the environment, human health, protected territories, zones and sites and public order'.

specific and is hence less frequently used by contracting authorities.

With the New Procurement Directive rules, this option for award without publication remains one of the few opportunities to justify such disregard of the stricter rules, and, in accordance with the Directive 2014/24/EU's preamble quoted above, the justification provided by the contracting authority in such cases will be insisted on much more rigorously, so that it can be clear that '[t]he circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority'.[41] It remains to be seen how this strictness will be transposed into Bulgarian legislation so that the difference will be felt by contracting authorities and the 'frivolous' use of this option with the purpose of selecting the desired candidate will be, at least to a large extent, thwarted. Obviously the current sanctions of up to BGN 20,000 (approx. EUR 10,225) for negotiation without prior publication in violation of the rules is not a sufficient incentive for contracting authorities to avoid restriction of competition through this type of award manipulation.

Are transparency rules breached?: Yes. The notice for the respective procurement is not published, while, at the same time, the time frame is considerably narrowed; competition is hence restricted, since the rules inherent to the legal procedure applicable in the specific case (usually an open procedure) are not applied.

What corruption loopholes are opened?: Corruption arises primarily due to the fact that, as commented above, this scheme leads to a significant restriction of competition and the selection of the desired contractor (corrupting/bribing candidate) is facilitated, and also due to the fact that the candidate may modify contract parameters to its own advantage (in a non-transparent manner in the course of the Negotiation Phase) and thus negotiate much more unfavourable conditions under the pretext that the contracting authority has urgent needs. Bribery / kickback or whatever method is used to induce the contracting authority to organise the procurement in this manner occurs at a much earlier stage, prior to the Announcement Phase, with the contracting authority delaying, to the last moment, the planning (determination of needs) in order to 'justify' the

[41] Directive 2014/24/EU, Art. 32, para 2(c) and Directive 2014/25/EU, Art. 50(d).

procedure as being urgent and unforeseeable.

These three main types of infringements at the Choice of Object (and procedure selection) Phase are still characterized by a relatively high occurrence; they are observed mainly in smaller municipalities with low administrative capacity and financial resources. The administrative liability in those cases, as provided by the PPA, is a financial penalty in the amount of max. BGN 50,000 (approx. EUR 25,810) to be applied in cases of non-conduct of the public procurement. These infringements comprise a large portion of the infringements detected by control bodies but this fact can also be attributed to their relative detectability and observability (precisely for the fact that in most cases the transparency principle and the PPA rules *en masse* have not been observed), as opposed to the next type of infringements which will be reviewed below. The characteristics of the infringements set out above allow for the secondary conclusion that their frequency can also be put down to the exceedingly inconsistent practice of the authorities providing *ex post* control, which, in some cases is overly restrictive even in the absence of a significant infringement, in terms of consequences. Against this background, as will be shown in the analysis below, 'grand' corruption in the higher levels of authority and lobbyist activities in the conduct of 'attractive' public procurement procedures remain undetected and far more difficult to prove, despite almost non-existent infringement of publicity and transparency rules.

Last but not least, the high prevalence of these infringements is not unusual for Member States.[42] As a basis for comparison of the frequency of occurrence of this type of infringements in Europe (with respect of the Regional Development and Cohesion funds projects in particular) see the data provided by the Annual Public Procurement Implementation Review 2012 below:

> 'The categories of 'absence of tendering or award of contract based on an inappropriate tendering procedure' and the 'award of supplementary contracts without competition' cover 34 % of all the procurement-related errors detected in the audits. The

[42] Account must also be taken of the instances of incorrect application of the law due to lack of understanding or misinterpretation during procedure selection.

inappropriate tendering procedure chosen is, naturally, the negotiated procedure. This infringement accounts for 65 % of the errors. Cancellation of public procurement procedures and direct award (or negotiation without publication) of the main contract without sufficient reasons is the source of 16 % of infringements. Artificial splitting of the contract is the error found in 14 % of the cases and incorrect specification of the predominant aspect for 'mixed' contracts and, thus, application of an inappropriate procedure in 5 % of the cases.'[43]

2.2. ANNOUNCEMENT PHASE

Setting very short time limits for tender preparation

Which legal provisions are infringed?: Article 64,[44] as well as Article 81, para 1 - 3, Article 93h, para 1, Article 97, para 1, Article 104, Article 104a, paras. 1, 2 & 4 and Article 114, para 2 of PPA.[45] Article 38 of

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[43] *Annual Public Procurement Implementation Review 2012*, Brussels, 9.10.2012 SWD(2012) 342 final; p. 36.

The *Annual Public Procurement Implementation Review 2013*, Brussels, 1.8.2014 SWD(2014) 262 final does not provide such statistics; hence, the data discussed is that for 2012.

[44] PPA, Art. 64: 'Upon conduct of an open procedure, the contracting authority shall dispatch the contract notice to the Agency for entry into the Public Procurement Register not later than fifty-two days before expiry of the deadline fixed for the receipt of tenders, and in the cases covered under […], not later than forty days before expiry of the deadline. (2) The deadlines referred to in Paragraphs (1) and (2) may be shortened to thirty-six days, provided that the prior information notice has been dispatched for publication between fifty-two days and twelve months before the date of dispatch of the notice referred to in Paragraph (1) and contains the information which is available at the date of dispatch of the said notice. (3) The deadlines referred to in Paragraphs (1) and (2) may be shortened by seven days where the notice has been transmitted by electronic means and by additional five days if the contracting authority offers full access by electronic means to the contract documents from the date of publication of the notice in an electronic format and if an Internet address at which these documents are accessible is specified in the text of the notice'.

[45] These PPA provisions cover all cases of fixed time limits for submission of tenders in accordance with both the different procedures and the type of contracting authority (classical or from the utilities sector). The texts are analogous and set the relevant deadlines and their reduction in compliance with European law. For this reason the provisions applicable to an open and restricted procedure are only referred to for illustrative purposes because the goals of this research do not require a concentrated focus on each individual provision and/or procedure.

Directive 2004/18/EC and Article 45 of Directive 2004/17/EC[46] as the case may be.

The New Procurement Directives (Article 47 of Directive 2014/24/EU and Article 66 of Directive 2014/25/EU in particular) define much shorter time limits (in some cases up to 50% shorter than current time limits) for procurement award with the purpose of speeding up the process and reducing procedure-related costs.[47] It is unclear, however, whether this reduction of time limits will not also result in decreased quality of bids and restriction of competition. Such pressure on participants may also increase the number of the infringements discussed here.

What does the infringement involve?: According to PFIA data, this type of infringement is one of the most common and the easiest to detect; it does, however, according to the PFIA, fall into the category of unsubstantial violations, *i.e.*, those which do not result in financial loss.[48] According to PFIA: 'Infringements of public procurement legislation of a procedural nature which do not result in violation of the principles of publicity and transparency; free and fair competition, equality and non-discrimination were established […]. These infringements relate to failure to observe the set deadlines, failure to submit information subject to promulgation in the Public Procurement register […].'[49]

This analysis should not go unchallenged. Reducing deadlines may indeed, in some cases, comprise a negligible infringement, easily detected by controlling authorities. At the same time it must be expressly distinguished from deliberate reduction with the purpose of favouring a

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[46] These are the relevant provisions setting the time limits as per European legislation, where in all cases the following principle should apply '[w]hen fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders […]' (Directive 2004/18/EC, Art. 38 (1)).

[47] Directive 2014/24/EU, preamble (80) 'In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the internal market and in particular SMEs. […] Therefore, provision should be made for reducing the minimum time limits in line with the rules set by the GPA and subject to the condition that they are compatible with the specific mode of transmission envisaged at Union level'.

[48] The number of procedural violations (including those where time limits have not been observed) for 2013, according to the PFIA report, is 599, *i.e.*, 24% of the total number of audited procurements.

[49] *Report on the activity of the Public Financial Inspection Agency for 2012* (2013), Sofia: PFIA, p. 11.

specific candidate, which, naturally, is far more difficult to prove. In some cases the deadlines for submission of tenders for more complex procurements (such as those in the field of power engineering or construction works) are insufficient for potential candidates to prepare a well-grounded and reasonable proposal. In such cases deadlines exceeding those set out in the PPA would be necessary. According to signals received and inspections made by control bodies, the favoured candidate quite simply has the tender documentation at its disposal prior to the opening date for purchase of the documentation and, consequently, has sufficient time to prepare. The fact that this infringement is all too common 'comes to show that granting preference to a specific performer […] can be carried out by reducing time limits or accepting documents submitted after the set deadline.'[50]

Are transparency rules breached?: No. There is no legal mechanism to monitor whether a candidate has advance knowledge of the contents of tender documents. The hypothesis of the PPA, which does not even define an administrative violation in this context, and the time limits provided by the PPA are observed, but are set at the very minimum; this does not result in lack of transparency. Notices are promulgated on time and sent to both the PPAgency and the OJEU (where applicable) and are published on the official website of the contracting authority (the 'buyer's profile'). Hence publicity and transparency requirements have been observed, the documentation is in perfect order and, at a first glance, competition in the sector is not restricted.

What corruption loopholes are opened?: An opportunity is given for familiarizing the favoured (corrupting) candidate / tenderer with details of the tender before all other candidates / tenderers which would give that candidate a very real chance of submitting the most suitable bid, whereas other candidates must fit within the artificially reduced time limits. Shortening of time limits may allow for other infringements instigated by corrupt motives, as will be reviewed below. For example, ambiguous or 'tailor-made' requirements which may result in confusion and may put off other potential tenderers may be imposed, while the preferred contractor will have all details smoothed out in advance and will be ready with the

[50] See *supra* note 13, p. 29.

bid. In this case, it is again the contracting authority or its employees that are bribed beforehand in order to concede to the corrupt scheme.

Lack of coordination between documents

Which legal provisions are infringed?: Article 25, para 2 of PPA,[51] Article 35 *et seq*. of Directive 2004/18/EC, Article 41 *et seq*. of Directive 2004/17/EC.[52] The New Procurement Directives (Article 48 *et seq*. of Directive 2014/24/EU and Article 67 *et seq*. of Directive 2014/25/EU) do not materially modify the content of the notice but introduce an additional option for the so-called 'sub-central contracting authorities', which, instead of publishing an all-European notice will be able to publish a prior information notice indicating that the contract will be awarded without further publication of a call for competition and inviting interested operators to express their interest in order to receive direct information regarding the procedure. The effect of this option is yet to be seen.

What does the infringement involve?: The manifestations of this type of infringement may be numerous and quite varied in terms of the different ways in which lack of coordination and precision of participation

[51] PPA, Art. 25(2): 'A contract notice shall include at least the following information: 1. name, address, telephone and facsimile numbers and electronic mail address of the contracting authority, and contact person; 3. object and subject matter of procurement, as well as quantity or scope, including such information about lots; 4. reference number according to the Common Procurement Vocabulary (CPV); 5. place and time limit for performance of the procurement; 6. The selection criteria, including requirements pursuant to Art. 49 and/or minimum requirements to the economic and financial standing of the candidate or tenderer and/or the technical capacity and/or qualifications thereof, where the contracting authority establishes such criteria, as well as references to the documents to be provided in evidence; 7. terms and amount of the participation guarantee and of the contract performance guarantee; 8. terms and method of payment; 9. period of tender validity in an open procedure; 10. criteria to be applied in the evaluation of tenders, and where the criterion of the most economically advantageous tender applies, also the criteria for arrival at an integral evaluation, including the relative weighting given to each of the criteria or indication of the said criteria in descending order of importance where weighting is not possible for demonstrable reasons; 11. indication of the possibility of submitting variants in the tenders; 12. indication of the possibility of the tenderers tendering for one, for several or for all the lots, where the subject matter of the procurement is subdivided into lots; 13. address wherefrom the contract documents can be requested and the final date for making such a request, the price and method of payment of the price to be paid for such documents; 14. address where at requests or tenders must be received, and deadline for the receipt thereof; 15. place and date of the opening of tenders or requests to participate; 16. date of publication of the prior information notice […], if any; 17. date of dispatch of the notice'.

[52] These are the rules on advertising and transparency, as envisaged in the Procurement Directives and in particular the content of the notices.

documents is achieved:

(i) the tender notice does not contain all necessary elements on the basis of which eligibility is assessed, with those elements, or a portion of them being listed only in the tender documents;

(ii) the tender notice fails to indicate all the selection criteria including minimum requirements as to the economic and financial standing of the candidate or tenderer and/or the required technical capacity and qualifications where the contracting authority makes such requirements, or fails to indicate all documents to be submitted as proof of such financial and technical capabilities;

(iii) inconsistencies between the requirements set out on different pages of the contract documentation;

(iv) inconsistencies and/or contradictions between the instructions to tenderers and the document templates attached, technical errors in the numbering of documentation attachments;

(v) inconsistencies between public procurement contract clauses and those contained in the draft contract attached to the contract documents.

Are transparency rules breached?: Where the infringement is connected with information which has not been reflected in the notice but only in the supplementary documentation, then transparency rules are breached because only those who have expressed an interest to participate and have purchased the full documentation set will receive additional information which, if known, could have broadened the circle of competitors. Yet, if the lack of coordination and discrepancies are detected in the remaining documentation, then transparency has not been violated to such a significant extent because the notification and publication process for the procurement has been successfully completed. The information published in the notice is publicly available; it does, however, provoke candidates and tenderers to reach ambiguous and contradictory conclusions. They do, of course, have the option to place additional questions to the contracting authority on any opaque issues or to choose to appeal those aspects, but such appeal will not result in suspension of the

procedure (in most cases).[53]

What corruption loopholes are opened?: Both the NAO and PFIA define this type of infringement as common and formal. The truth is that some of these infringements may, indeed, be classified as insignificant and/or technical errors. What is more, contracting authorities which organise a large number of similar tenders often fail to carry out a thorough check of notices (due to insufficient administrative capacity) and these are frequently prepared on the basis of a 'copy-paste' approach with additional information being added indiscriminately to the contract documents or the notice itself. Against this backdrop of easily detected infringements (and all other types discussed so far), however, the possibilities for corruption which such an inaccurately prepared procurement can create – namely that the desired candidate could be instructed in advance on how to prepare its bid – should not be overlooked. In addition, this type of infringement can exist in combination with infringements in the definition of selection criteria, as described below.

Inclusion into the contract documents of selection criteria and/or technical specifications which unreasonably restrict participation in the procurement or offer an advantage to one of the tenderers/candidates

Which legal provisions are infringed?: Article 25, para 5 & 6,[54]

[53] As discussed in chapter 3, except in cases of appeal of the final, contractor-appointing act, appeals regarding actions or inactions by the contracting authority do not have a suspensive effect, although suspension of the procedure may be requested, separately from the appeal procedure, from the CPC, which rules on a case by case basis.

[54] PPA, Art. 25(5) & (6): '(5) No terms or requirements which offer an advantage or unjustifiably restrict the participation of any parties in the public procurements or which do not conform to the subject and quantity or volume of the procurement may be included by contracting authorities in the decision, notice, or documents. (6) The selection criteria […] and the documents required for the fulfilment of the said criteria must take account of and conform to the scope, subject, value, complexity as well as the quantity or volume of the public procurement and the purpose of the works, supplies or service. Recognised experience in the respective sector may be required, as a selection criterion, but no conditions and requirements related to the performance of public procurements, or the performance of specific programmes or projects shall be included, nor shall the specification of funding sources or a specific number of implemented contracts with explicit listing of their subjects *etc*., where such conditions or requirements run contrary to the provisions of para 5. Where the public procurement contains lots, the selection criteria for each lot must correspond to the characteristics listed for the respective lot'.

Article 32[55] of PPA, Section 2 'Criteria for qualitative selection' & Article 23 of Directive 2004/18/EC, section 1 'Qualification and qualitative selection' & Article 34 of Directive 2004/17/EC.[56]

In addition to the currently known methods for selection of participants and determination of technical specifications,[57] the New Procurement Directives introduce several additional options which will not only facilitate all participants in the procedure but will also contribute to a significant decrease of this type of infringements (at least with regard to the selection criteria requirements) – (a) the recognition of the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence replacing the certificates issued by public authorities or third parties confirming that the relevant economic operator meets the relevant selection criteria[58] and (b) use of the e-Certis system which aims 'to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities.'[59] In addition to achieving a significantly higher level of standardisation of the

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[55] PPA, Art. 32: 'The technical specifications must afford the candidates or tenderers equal access to participation in the procedure and must not unjustifiably hinder competition. (2) The technical specifications must not be defined by reference to a specific make, source, a particular process, trade mark, patent, type, a specific origin or production with the effect of favouring or eliminating certain persons or certain products. Such reference shall be permitted on an exceptional basis, where a precise and intelligible description of the subject matter of the procurement according to the procedure […] is not possible, and any such reference shall mandatorily be accompanied by the words 'or equivalent'.

[56] Relevant ECJ practice with respect to the requirements of the contracting authorities, which reinforces and adds to the above comments, could be found in: (1) Joined cases C-226/04 and C-228/04 *La Cascina Soc. Coop. arl.* [2006] ECR I-0147, stating that the procedural conditions need to be clearly defined in advance and made public and to apply to all candidates; (2) Case C‑218/11 *Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig) and Hochtief Construction AG Magyarországi Fióktelepe v. Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság*, ECLI:EU:C:2012:643, 18.11.2012, shows that the ECJ held that a contracting authority may require a minimum level of economic and financial standing to be demonstrated by reference to particular aspects of a company's balance sheet. And this cannot be disregarded solely because it relates to an aspect of the balance sheet where there may be differences between the legislation of member states; (3) Case C-278/14 *SC Enterprise Focused Solutions SRL v. Spitalul Județean de Urgență Alba Iulia*, ECLI:EU:C:2015:228. 16.4.2015, stating that the contracting authority could not amend the technical specification in respect of an element of the contract, regardless of whether or not the element referred to in the specification was still in production or available on the market *etc*.

[57] Directive 2014/24/EU, Art. 57 *et seq*. and Directive 2014/25/EU, Art. 77 *et seq*.

[58] Directive 2014/24/EU, Art. 59.

[59] Directive 2014/24/EU, recital (87).

documents required for the selection, this will also help distribute the responsibility for the submitted evidence of suitability between the contracting authority and the contractor, which may, in turn, play a positive role in the fight against the unduly detailed requirements set out by some contracting authorities.[60]

What does the infringement involve?: In each public procurement award procedure, the contracting authority is entitled to set the minimum level of requirements concerning tenderers' qualities. Compliance with these requirements would serve as a guarantee that the tenderers which meet them will have the capacity to ensure quality implementation of the contract. These requirements as to the economic and financial standing, technical capacity and qualifications of tenderers have been identified by national and EU legislation under the aggregate term of 'selection criteria'. They must be as specific as possible and must conform to the individual subject matter of the public procurement, its complexity, scope and value.

Further, the contracting authority also defines the technical specifications to be met by the bid itself, depending on the specific subject of the procurement. As opposed to the selection criteria, where specific documents and certificates are required to evidence the capacity of candidates, here the contracting authority describes certain quantity, quality and other parameters and professional characteristics which it regards as absolutely essential for proper contract implementation.

NAO's control activities reveal that cases in which contracting authorities set discriminatory selection criteria and/or technical specifications which unreasonably restrict the participation of certain entities or provide unwarranted advantage to others, are becoming more and more frequent. Infringements of this type[61] may take numerous forms,

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[60] Of course, only time will show whether these changes will be negated by corrupt practices, bearing in mind that the weakness of the ESPD is that the contracting authority verifies the authenticity of what has been stated only after the contractor has been selected, and only with regards to the selected contractor. If it turns out that the selected contractor fails to meet what has been declared in ESPD, then the next one in line will have to be selected (if the current rule in this respect is retained) which may allow (for example) related-party schemes or bid rigging, as will be analysed below.

[61] These two different infringements which are manifested either in connection with the selection criteria and/or the technical specifications are reviewed jointly because they have the same result, namely restriction of competition in the respective procedure and facilitated selection of the 'favoured' candidate.

as elaborated below.

Naturally, the definition of technical specifications provides much greater opportunities for the contracting authority to prepare 'tailor-made' documentation.[62] The specification of overly detailed technical characteristics has a much bigger corruption potential in comparison to other types of violations and infringements. For example, the characteristics of the 'required' piece of equipment may be listed in such detail that only one particular type of equipment will comply or the characteristics of construction materials used by a particular construction company are described *etc*.

In addition to being one of the most conducive to corruption schemes, this type of procurement manipulation is also very difficult for controlling bodies to detect due to the highly specialized details of the specification. As Søreide notes, '[t]he size and the complexity of the project or product in question are the most important factors explaining differences in motivation and opportunities for grand corruption. […]The more high technology involved, or seemingly involved, the more attractive the project will be to the potential beneficiaries. This kind of 'mystification' reduces the risk of being criticised for paying too much. (Moody-Stuart exemplifies: '*How many people can say whether a particular fighter aircraft should have cost $21 million rather than $23 million?*).'[63]

So, what are the 'national' peculiarities which additionally impede the detection of this type of corrupt manipulations?

First of all, it must be remembered that the main control bodies, in the face of the PFIA and NAO have insufficient financial and administrative capacity. The CPC, as an appellate authority, uses experts on a more frequent basis or else resorts to sending letters of inquiry to leading specialists in specific fields, but these do not always ensure satisfactory

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[62] Directive 2014/24/EU, preamble (74) draws particular attention to the fact that 'technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible'.

[63] Søreide, T. (2002). *Corruption in Public Procurement: Causes, Consequences and Cures*, Report R 2002: 1, Bergen: Chr. Michelsen Institute Development Studies and Human Rights, p. 11.

results. In very rare cases control or appellate authorities may afford to hire narrow (and thus expensive) experts who are able to analyse the complexity of the procurement in such detail as to establish discriminatory conditions.[64] For this reason, pedantic observance of several PPA provisions is usually imposed, namely those which describe the different documents which tenderers may be requested to provide as evidence of compliance with selection criteria.[65] Consequently, the detection ratio for such infringements is relatively small. For 2013, according to PFIA data 'the contracting authorities under 27 public procurements were found to have set conditions which offer an advantage or unjustifiably restrict the participation of tenderers in the relevant procedures'[66] out of a total of more than two thousand and four hundred procurements.

Precisely because of the above restrictions on the functions of control bodies, in the cases of exceedingly detailed and restrictive technical specifications, responsible bodies monitor, in a very superficial manner, whether the legally required wording 'or equivalent' is present at the end of the description without, however, examining the respective criteria

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[64] In 2014 a particular public procurement for the 'Supply and warranty service of motor vehicles' came to the public attention. Due to the fact that in this case there is a wider circle of experts familiar with the subject matter and there was no need for an expert opinion as to whether the technical requirements contained discriminatory conditions, the specifics of the technical requirements presented themselves all too clearly. A curious detail is that the contracting authority is the State Agency for National Security (a national body specializing in the detection of 'grand' corruption, as discussed in chapter 4). By means of notice No 01666-2014-0003, dispatched for publication by the PPAgency, the contracting authority sought to purchase 84 motor cars in the estimated value of BGN 3,000,000 (approx. EUR 1,533,861) with the express instructions that: 'Upon preparation of their bids, participants must strictly adhere to the requirements to the vehicles, as set out in the technical specifications for the respective lots'. The technical requirements then proceed to set strict parameters per vehicle, for example: at least 300 horsepower 3.0 litre petrol engine four-wheel drive, minimum 70 l tank capacity, maximum CO2 emissions of 235 g/km and exact parameters as to width and length. Naturally, only a very specific type of luxury car matches these parameters and this car was only offered by the desired candidate. In practice, all of the vehicles under the different lots are described in similar detail and, of course, as expected, the desired candidate won the contract. So far, however, except for the very vocal media response and the reaction of the CPCCOC that the procurement will be noted down as one containing irregularities, there has been no reaction from control bodies, nor has there been any reference to the Prosecutor's office.

[65] *e.g.*, appropriate statements from bankers or copy of a professional liability insurance policy; the annual financial statement or any of the constituent parts thereof; a statement of the overall turnover and of the turnover in respect of the supplies, services or works, which are subject matter of the procurement, for the three previous years, depending on the date on which the candidate or tenderer was established or commenced activity.

[66] *Report on the activity of the Public Financial Inspection Agency for 2013* (2014), Sofia: PFIA, pp. 11-12.

themselves.

With regards to manipulations of the selection criteria themselves it should be noted that these are relatively easy to detect and hence less frequently used for 'grand' corruption. This type of infringements usually involves:

(i) unjustified reference, within the terms of reference, to a specific model, source, process, trademark, patent, type, specific origin or production;

(ii) inclusion of requirements for turnover in such volume as bears no relation to the estimated value of the procurement;[67]

(iii) introduction of restrictive requirements towards individual parties within an association/consortium, for example the requirement that each member of the association/consortium must individually meet the minimum eligibility requirements for general turnover/specific turnover or number of contracts completed, instead of the consortium as a whole;

(iv) restricting potential tenderers by introducing requirements for specific experience connected to a specific source of funding; or requirements for specific quality certificates which are in no way connected to or necessary for procurement implementation;

(v) limiting the opportunities for participation of sub-contractors;

(vi) some contracting authorities use 'parasitic' criteria which have no relevance to the subject matter of the public procurement. The purpose of this practice is to introduce a maximum number of criteria which are then assessed subjectively, in favour of one of the tenderers at the expense of other, more accurate and clearly measurable criteria. Such parasitic criteria are, for example the phrases 'quality design of the tender' or 'clear vision for the development of the sector', widely quoted by control bodies as poor practice.

Case law has, over the years, imposed a constant parameter with

[67] With the 2014 amendments to PPA (SG 40/13.5.2014, effective as of 1.7.2014) this type of infringement, at least, is expected to decrease significantly, as PPA, Art. 50(3) was expressly modified so that the required turnover is now no more than 50% of the procurement value.

regards to certain more specific conditions regarded as discriminatory,[68] which, however, have already acquired a wide popularity. Contracting authorities now tend to avoid them, becoming, instead, more and more inventive in the elaboration of such terms of reference in which only narrow specialists in the respective field could possibly detect the presence or not of corrupt and restrictive mechanisms.

Are transparency rules breached?: No. The notice is usually rigorously prepared without any technical errors; it is duly submitted to the PPAgency and the OJEU and uploaded on the webpage of the contracting authority, in compliance with the requirements of the PPA and the relevant Directive. In its subsequent phases, the procedure observes all publicity requirements.

What corruption loopholes are opened?: As Rose-Ackerman notes: 'Whenever regulatory officials have discretion, an incentive for bribery exists'.[69] In this case, the inclusion of restrictive selective and technical conditions significantly impedes competition. The corrupt result is achieved by introducing considerable requirements which do not correspond to the complexity of the procurement or requirements that are overly detailed, to the advantage of a specific tenderer. Contracting authorities prepare and word the tender documents and the participation conditions in a way that will allow the contract to be obtained by a specific candidate. All these cases result in elimination of competitive bids and award of the contract to the desired party. With this type of corruption schemes, similarly to those discussed so far, the contracting authority has selected the desired contractor (and has already been bribed or promised certain benefits) at a much earlier stage, and, by the time the procurement documentation is prepared and the Announcement Phase has been reached, the contracting authority is already deep into the corruption scheme.

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[68] Decision 531-2007 of CPC and Decision 1136-2007 of CPC declare the criterion 'number of subscribers of the mobile operator at the date of tender submission' as discriminatory; Decision 983-2007 CPC defines the criterion 'number of roaming agreements concluded' as discriminatory in some cases; Decision 39-2007 CPC declares the requirement that each participant must indicate a list of main construction contracts performed in the country and EU states over the preceding 5 years as discriminatory *etc*.

[69] Rose-Ackerman, S. (1999). *Corruption and government*. New York: Cambridge University Press. p. 18.

Mixing up selection and contract award criteria[70]

Which legal provisions are infringed?: Article 25, para 10 of PPA;[71] the principles of non-discrimination and proportionality in line with the Procurement Directives and the New Procurement Directives, as well as the relevant ECJ practice, as discussed below.

What does the infringement involve?: The Bulgarian legislator has ruled that in preparing the requirements to candidates/tenderers, a distinction must be made between selection criteria[72] and contract award criteria. Selection criteria, as already commented above, are the minimum criteria to tenderers which must be met for a tenderer to be able to participate in the procedure. Contract award criteria, on the other hand, refer to the quality of the offer itself. Such criteria and their relative weight must be directly linked to the subject matter of the public procurement with regard to quality, price, technical merit, aesthetic and functional characteristics, characteristics related to environmental protection, running costs, warranty after-sales service and technical assistance, delivery date *etc*.[73] In addition the award criteria should be interpreted in the same way throughout the entire procedure.[74]

Further, '[c]ompliance with the selection criteria set out by the contracting authority under a specific procedure must be assessed by the committee solely with a 'yes' or 'no' […]. [It] cannot be subject to gradation. For this reason both the tenderer evidencing compliance with only the minimum level required by the contracting authority, and the

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[70] *i.e.*, in the cases where the selected criterion is 'the most economically advantageous tender'. According to §1, it. 8 PPA: ''Most economically advantageous tender' shall be the tender which complies to the greatest extent with the criteria as announced in advance by the contracting authority and the weight to be given to each such criterion, directly related to the subject matter of the public procurement with regard to quality, price, technical merit, aesthetic and functional characteristics, characteristics related to environmental protection, running costs, warranty after-sales service and technical assistance, delivery date *etc*. Upon award of procurements covered under Art. 3, para 2 [*i.e.*, special purpose and military procurements], criteria such as lifecycle costs, security of supply, interoperability, operational characteristics *etc.* may be included as well'.

[71] PPA, Art. 25(10): 'Where the criterion chosen is the most economically advantageous tender, contracting authorities shall not have the right to include selection criteria as criteria for arrival at the evaluation of the tenders'.

[72] Or 'criteria for qualitative selection', as is the term used in the Procurement Directives.

[73] See Directive 2004/18/EC, Art. 53.

[74] See Case C-19/00 *SIAC Construction Ltd.* [2001] ECR I-07725, par. 43.

tenderer who significantly exceeds these requirements should be admitted to further participation in the procedure.'[75]

Contracting authorities, however, wrongly assume that certain elements of the selection criteria can be used to evaluate the offer itself if those elements have not been quoted expressly as a selection requirement to the tenderers in the same procedure. This leads to infringements in so far as the NAO interprets and applies very clearly the ban on mixing up selection criteria with contract award criteria and does not accept any exceptions.

Prior to 2009, the PPA did not contain an explicit prohibition with regards to the criteria. Following the judgment in *Lianakis AE and others v Dimos Alexandroupolis*,[76] however, an amendment was introduced to bring matters into line with European practice in the field of public procurement by prohibiting the blending of selection and award criteria. The practice of appellate bodies in Bulgaria conforms to European practice on this point.[77]

Decision No 765 of the CPC from 2009 maintains that 'it is not possible, at the tender evaluation phase, to request a piece of equipment which must meet mandatory technical specifications and at the same time to evaluate compliance with these requirements. This is so because if a piece of equipment is offered which does not fully comply with the mandatory technical specifications, then the tender submitted by the respective tenderer should already have been eliminated at the phase of evaluating compliance of the offers with pre-announced conditions and should not have been admitted to evaluation and ranking. In this sense the introduction of an indicator which assesses compliance with technical requirements, an aspect which should be subject to the previous phase in

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[75] See *supra* note 35, p. 4.

[76] Case C-532/06 *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis et al.* [2008] E.C.R. I-251.

[77] See, *e.g.*, CPC Decision No 420 dated 28.4.2009 of the CPC under File No 180/26.2.2009; Decision No 499 dated 26.5.2009 of the CPC under File No 286/21.4.2009; Decision No 510 dated 26.5.2009 of the CPC under File No 207/10.3.2009; Decision No 513 dated 28.5.2009 of the CPC under File No 303/6.4.2009; Decision No 613 dated 23.6.2009 of the CPC under File No 379/29.4.2009; Decision No 713 dated 14.7.2009 of the CPC under File No 398/11.5.2009; Decision No 723 dated 16.7.2009 of the CPC under File No 426/19.5.2009; Decision No 749 dated 23.7.2009 of the CPC under File No CPC-500/12.6.2009 *etc*.

the work of the committee, results in complete inapplicability and redundancy of such an indicator within the evaluation methodology.'[78]

Contracting authorities need to apply the minimum requirements as a criterion enabling them to sift between inexperienced and poorly-prepared participants; in any case, pre-set conditions must not grant an advantage to, or limit the participation of, certain candidates.

Are transparency rules breached?: Again, as in the above cases, this infringement does not concern the principles of publicity and transparency. All potential participants in the procedure are equally familiar with the conditions and may appeal them, if they choose. All procurement publication requirements have been observed. Tenderers which have applied to participate have been provided with identical information.

What corruption loopholes are opened?: Candidates which meet the selection criteria but do not have the capacity to meet the evaluation criteria are nevertheless admitted to the subsequent phases. Based on the '*primus inter paris*' principle, candidates are assessed almost solely on the basis of selection criteria; this not only infringes the law but also opens the floodgates for a completely subjective choice of candidate by the contracting authority – a candidate, which, as was clear from the very beginning, lacks the necessary technical (quality) experience to meet the needs of the contracting authority. This type of infringement allows corruption precisely in those cases where the bribing candidate is clearly unfit for the purposes of the procurement and the documentation has been prepared in such a way as to allow the candidate to receive points under some of the selection criteria (as per the relevant assessment formula), so that the selection will be 'by the rules'.

Infringement of, and changes in, the evaluation methodology[79]

Which legal provisions are infringed?: Article 28, para 2 & 3 of

[78] Decision No 765 dated 23.7.2009 of the CPC under File No CPC-574/2.7.2009.

[79] *i.e.*, under 'the most economically advantageous tender' criterion.

PPA,[80] the main principles of the Procurement Directives.[81] The New Procurement Directives now contain the obligation / prohibition set out by the PPA – the method of bid evaluation should remain stable and unchanged in the course of the procedure.[82]

What does the infringement involve?: The infringement in this case involves two separate problematic aspects. *Firstly,* these are cases involving ambiguous, incorrectly formulated bid assessment methodology. *Secondly,* the actions of the expert committee[83] are also an issue, as they use/change the assessment methodology in breach of the law;[84] committee actions are not subject to direct control by control bodies (only to internal control by the contracting authority itself).

The methodology for tender evaluation is expected to contain clear guidance and a specific evaluation range. The adopted rating scale must conform to the needs of the contracting authority and the need to select a contractor and must be applied strictly and consistently with respect to all participants. For this reason and in accordance with legal rules, the contracting authority appoints an evaluation committee. This committee should comprise of individuals with the necessary professional qualifications and practical experience in accordance with the subject

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80 PPA, Art. 28(2) & (3) of PPA: 'Art. 28. (2) The methods […] shall contain precise directions on arrival at an evaluation under each criterion and on arrival at an integral evaluation of the tender, including the relative weighting given by the contracting authority to each of the criteria chosen to determine the most economically advantageous tender to each of those criteria. The relative weighting given to the separate criteria can be expressed by providing for a range with an appropriate maximum spread. (3) The contracting authority shall apply the methods in respect of all tenders admitted to evaluation without modifying the said methods'.

81 According to Directive 2004/18/EC recital (46) 'It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders'.

82 According to recital (45) of the preamble of Directive 2014/24/EU 'Award criteria and their weighting should remain stable throughout the entire procedure and should not be subject to negotiations, in order to guarantee equal treatment of all economic operators'.

83 In an open procedure, the evaluation committee is appointed by the contracting authority following expiry of the deadline for bid submission and, in the event of restricted procedure, competitive dialogue or negotiated procedure – following expiry of the time limit for submission of applications.

84 In this respect see also Case 496/99 *Commission v. Italy (Succhi di Frutta)* [2004] ECR I-3801.

matter and complexity of the procurement.[85] The committee must be able to apply the guidance provided in the methodology. It gives a reasoned expert opinion on the different elements subject to evaluation based on its own experience and also on the basis of adopted standards, rules and traditions in theory and practice.

It should be stressed that in performance of its obligations the committee acts as appropriate and its decisions are not subject to (judicial) control.[86] The PPA, naturally, prohibits arbitrariness and discriminatory evaluations by the evaluation committee, but this prohibition remains *nuda* in the absence of subsequent control and counteraction activities. Control bodies monitor whether the committee has certain motives which coincide with the proposal made by the respective tenderer. The selected methodology and the evaluation of the committee, however, do not fall within their discretion.[87]

Common manifestations of infringements based on the contents of the assessment methodology and its application are as follows:

(i) In many cases the methodologies for evaluation of tender proposals set out specific formulas to be applied. The elements of these formulas, however, are assessed arbitrarily, they are not given a quantitative expression but are evaluated only by means of a qualitative criterion, which depends on the opinion of the evaluation

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[85] The legislator has adopted a declaratory approach as an anti-corruption measure against subjective and/or discriminatory attitude towards participants. The provisions of PPA, Art. 35(1) require that members of the committee have no material interest in the award of the public procurement to a particular candidate or tenderer; are not 'related parties' to any candidate or tenderer in the procedure or to any subcontractor named by any such candidate or tenderer, or to any members of the management or supervisory bodies thereof and have no private interest, within the meaning given by the Conflict of Interest Prevention and Ascertainment Act (*Закон за предотвратяване и установяване на конфликт на интереси*, promulgated SG 94/31.10.2008, as amended), in the award of the public procurement. Absence of such circumstances is evidenced by means of a declaration.

[86] Such control usually takes place at the level of the decision of the contracting authority (if appealed), as the committee makes a recommendation to the former.

[87] For example, Decision No 519 dated 8.5.2012 of the CPC: 'The points awarded on behalf of the committee appointed by the contracting authority and more specifically the exact number thereof under the different sub-indicators is subject to the discretion of the committee and comprises an assessment of appropriateness. The control activities of the CPC constitute a review of legality and are aimed to assess whether the evaluation performed by the committee is motivated and whether it complies with the methodology adopted by the contracting authority and the requirements set out by the latter'.

committee. The absence of predefined correspondence between the rating given by the committee (most commonly expressed in points) and the tender indicators is a common reason for disputes and conflicts between contracting authorities and contractors;

(ii) Also commonly, the indicators are formulated without reference to the objective circumstances on which the number of points awarded should depend, or there is no clear and specific guidance on how the indicators are assessed which creates prerequisites for arbitrariness of the evaluation.[88] Unlawful conditions for elimination of tenderers are introduced regardless of the fact that their bids meet the requirements for award of the public procurement and they are entitled to be ranked.

(iii) Although the contracting authority has the freedom to determine the weight of the separate criteria, the cases of setting the 'price' component under 50% (40% or 30%) in the final evaluation can, most commonly, be regarded as corrupt behaviour.

(iv) The contracting authority sets, in the applicable methodology, only the relative weight of the indicators (for example 50 points to be awarded under the 'warranty period for the procurement' indicator) without specifying how the maximum and minimum number of points are to be awarded. No rating or grading scale or additional clear instructions are provided. Thus the assessment rests solely on the subjective opinion of the evaluation committee (see a detailed example in the decision reached in the *Tabakov - Chaushev* case below);

(v) Last but not least – changes in the evaluation methodology and the evaluation formula in the course of submission of tenders under the respective public procurement.[89] This infringes the main principles of equality and non-discrimination, and free and fair competition (again,

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[88] This is also the context of the '*Report on the activity of the Audit Office of the Republic of Bulgaria for 2012'* which states as follows: 'The efforts of contracting authorities to define clear and accurate instructions on tender evaluation are insufficient which poses the risk of arbitrariness on behalf of tender committees', page 16.

[89] This infringement subtype systematically occurs at the Announcement Phase (as already discussed), but due to the fact that infringements of the evaluation methodology are reviewed in this section, it is positioned here as well.

the *Tabakov - Chaushev* case is a good example for such infringement).

Are transparency rules breached?: Except in the cases where the evaluation methodology is modified in the course of the procedure, there is no actual breach of transparency obligations because the methodology is announced in advance, by all legal means, and candidates/tenderers are able to study and, respectively, challenge it before a court, if they find it abusive. Abuse of the evaluation methodology, however, is not easily detectable, on the one hand, and what is more, such appeal would not have a suspensive effect on the procedure (as discussed above).

What corruption loopholes are opened?: In the case of corrupt practices, evaluation criteria and formulas are either *too complex and intricate* with the aim of obstructing detection of manipulative factors, or *too vague and ambiguous*, allowing the evaluation committee to justify its arbitrary decision more easily. With this type of violation involving serious corruption risks, control bodies often find it difficult to identify discriminatory and restrictive elements, and infringements remain undetected. In addition, the infringement opens up the opportunity for bribery/kickback of the interim element – the evaluating committee. Consequently, the artificial weight attributed to a specific evaluation criterion and/or the behaviour of the committee, coordinated in advance, predetermines the outcome of the procedure to the advantage of the desired/corrupting future contractor.

In relation to the above, Pashev, Neshev and Indzhova have rightly opined that '[t]he most serious risk of corruption following ranking is the reduction of the quality parameters of the tender or their gross disregard, even changes in price conditions. This allows the supplier who has provided the bribe to be ranked on the basis of most advantageous price or the most economically advantageous offer because the latter is aware that these parameters only aim to eliminate competition and have little relevance to the actual performance thereafter.'[90]

[90] ed. Pashev, K. and Marinov, K. (2009). *Reducing the risks of corruption and introducing good practices in public procurement management*, Sofia: Governance Monitoring Association and Economic Policy Institute, ch. 1, pp. 54-55.

The analysis of infringements at the Announcement Phase reveals that this phase in the award procedure is exceedingly open to corruption mechanisms of all sorts – from the use of seemingly insignificant parameters of the tender notice to serious manipulation of the entire procurement by setting highly professional and overly complicated technical requirements or the use of a complex or multi-layered methodology for evaluation of candidates and tenderers. Despite the positive publicity achieved through promulgation of the required documentation and proper formal completion of all standard documents, corrupt models here are rife. These are additionally facilitated both by the fact that they are difficult to detect, and due to the absence of quality *ex ante* control (except for the cases listed in chapter 3) which, if applied correctly, could limit at least a portion of these incidents as early as the Announcement Phase. Even when detected, the administrative penalty applied – a fine (with a maximum limit of up to BGN 25,000 (approx. EUR 12,905)) evidently does not have a sufficient deterrent effect. The option for judicial review of the acts or inaction of contracting authorities at this phase of the procedure is also not considered as a sufficiently effective and dissuasive remedy due to the additional time required for such proceedings and the statutory possibility for the award procedure to continue during such proceedings.

With regards to the infringements at the Announcement Phase the changes expected with the transposition of the New Procurement Directives deserve special attention. The European legislator, after numerous discussions and vacillations[91] resolved that the award criterion will now be only one, *i.e.*, the 'most economically advantageous tender'.[92] What has happened in practice is that the above criterion has swallowed

[91] See *Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market*, Brussels, 27.1.2011, COM(2011) 15 final, p. 37; *European Parliament Resolution of 18 May 2010 on new developments in public procurement*; *European Parliament Resolution of 25 October 2011 on modernisation of public procurement*; *Opinion of the European Economic and Social Committee (EESC) on the European Commission's Green Paper on the modernisation of the public procurement rules and the Green Paper on expanding use of e-procurement*, 29.10.2011.

[92] Directive 2014/24/EU, Art. 67(1): 'Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender'.

the 'lowest price' criterion, which is also possible, but must now be bound with the use of a cost-effectiveness approach, such as life-cycle costing and may include the best price-quality ratio. 'Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts'.[93] The motives of the European legislator for this change, regarded by some authors as purely cosmetic,[94] arise from the concern that 'public procurers often have to prioritise legal certainty above policy needs and, given the pressure on public budgets, frequently have to award the contract or service in question to the cheapest offer rather than the most economically advantageous tender; [...] this will weaken the EU's innovative base and global competitiveness; […] the Commission [*has*] to remedy this situation and to develop strategic measures to encourage and empower public procurers to award contracts to the most economical, highest-quality offers.'[95] Thus, regardless of the fact that the option remains for the main (but not exclusive) criterion to be the price, 'the most economically advantageous tender' becomes the preferred criterion. From an anti-corruption point of view, however, and particularly in view of the comments on infringements at national level in Bulgaria this is hardly the best possible approach. The above analysis of infringements and, indeed, the entire present chapter indicates that the more complicated and complex a procurement is the more corruption loopholes it opens – especially at the selection methodology level, at the technical specifications level, at the evaluation committee assessment level. Practice reveals that where the criterion is 'the lowest price', the opportunities for manipulation, especially of types which control bodies find hard to detect, are significantly reduced. Of course, only future practice and the actual manner of transposition of the New Procurement Directives will show whether this observation will remain correct in the future as well, and will reveal the resourcefulness of contracting authorities to manipulate tenders.

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93 Article 67, para 2 of Directive 2014/24/EU.

94 Arrowsmith, S. (2014). *The Law of Public and Utilities Procurement – Regulation in the EU and UK*, *Vol. 1*, Third Edition, London: Sweet and Maxwell, p. 737.

95 *European Parliament resolution of 18 May 2010 on new developments in public procurement* (2009/2175(INI), P7_TA(2010)0173 New developments in public procurement, p. 4.

2.3. PROCEDURE CONDUCT PHASE

Unjustified cancellation or continuance of procedure on behalf of contracting authorities

Which legal provisions are infringed?: Article 39, para 1 and 2 of PPA.[96] In conformity with Directive 2004/18/EC and the new Directive 2014/24/EU, respectively, national legislation may determine the cases in which a procedure must or may be terminated; those directives provide only that contracting authorities must inform the participants of their decision as soon and as correctly as possible.[97]

What does the infringement involve?: In certain cases stipulated by law, the contracting authority is obligated to cancel the procedure. The legislator, however, has allowed for several scenarios which permit the contracting authority a margin of discretion. The procedure *may* be cancelled when only one tender or application has been submitted, or only one candidate or tenderer has been admitted, or when only one offer complies with pre-set conditions; there are other situations as well, which

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[96] PPA, Art. 39(1) & (2) (emphasis added): '(1) The contracting authority *shall terminate* a procedure by a reasoned decision where: 1. not a single tender, request to participate or design has been submitted or not a single candidate or tenderer complies with the requirements [...] or not a single request to participate in a negotiated procedure has been submitted; 2. none of the tenders or designs conforms to the terms and conditions as announced in advance by the contracting authority; 3. all tenders, which comply with the terms and conditions as announced in advance by the contracting authority, exceed the financial resources which the said authority can ensure; 4. the tenderers ranked highest and second highest decline to conclude a contract; 5. the necessity to conduct the procedure is eliminated as a result of a material change in circumstances, or an impossibility to ensure financing for performance of the procurement for any reasons which the contracting authority could not have foreseen; 6. infringements are detected in the initiation and conduct of the procedure which cannot be cured without change of the terms whereunder the procedure has been announced; 7. a public procurement contract is not concluded by reason of existence of any of the grounds covered under Art. 42(1) 1 herein [*i.e.*, the highest ranked tenderer fails to present documentary proof of registration; fails to present the contract performance guarantee *etc.*].

(2) The contracting authority *may terminate* the procedure by a reasoned decision where: 1. a single tender, request to participate or design has been submitted; 2. a single candidate or tenderer complies with the requirements covered under Art. 47 to 53a herein, or a single tender or design conforms to the terms and conditions as announced in advance by the contracting authority; 3. the highest ranked tenderer: (a) declines to conclude a contract, or (b) fails to fulfil any of the requirements covered under Art. 42(1) herein [*i.e.*, fails to present documentary proof of registration; fails to present the contract performance guarantee *etc.*]', *etc.*

[97] See Directive 2004/18/EC, Art. 41and Directive 2014/24/EU, Art. 55.

(regardless of the fact that there is no illegal action) restrict the competitive choice of the contracting authority. The contracting authority is provided with the legal option and discretion to select one of two possible courses of action: to cancel or to continue the procedure. If cancelation of the procedure is selected, the contracting authority may open a new public procurement award procedure with the same object, but only after entry into force of the termination decision.

There are many cases in which contracting authorities may decide *to cancel the procedure* at any of its different phases. The grounds cited are, for example, lack of available funding, or non-compliance of the candidates or their offers with valid requirements. A poor practice and one that reveals corrupt intent, is termination of the procedure when the favoured candidate lacks real chances to obtain the contract. At the same time the contracting authority, not being obliged to cover costs incurred by candidates by that point – for tender preparation, the provision of the required bank guarantee, purchase of tender documents *etc.*, has nothing to lose (except time) if the tender is cancelled.

> 'When all the instruments discussed so far fail to secure victory for the predetermined supplier, the contracting authority may cancel the procedure justifying its decision with either lack of funding or non-compliance of submitted tenders with the terms of reference. In most cases there are no clear arguments to such decisions and 'unwitting' tenderers are left only with the expenses incurred for their application and a significantly diminished desire to participate 'as per general rules' next time. The negative experience from participation in fraudulent tender procedures contributes to restrict competition and widens the circle of companies willing to participate in public procurement tenders through bribery.'[98]

The *opposite scenario* should also be highlighted, namely when there are grounds for termination of the procedure but this is not done. Such an infringement is illustrated in the reasoning for the decision in the *Tabakov - Chaushev* case; this reveals that in most cases a corrupt procedure is not

[98] See *supra* note 90.

terminated solely because advantage for the pre-selected performer is sought. In this case the contracting authority makes use of the legal option to continue the procedure despite the absence of competition and to award the contract to the only remaining candidate which 'fits' the requirements or as the case may be, which has submitted an offer. This practice not only reveals strongly corrupt motives but also runs counter to the concept in European legislation and practice that the contracting authority has the option to terminate the procedure on the least suspicion in the characteristics and personal situation of the candidates precisely for the purpose of ensuring maximum competition (in the subsequent procedure implementation) and participation only by those candidates who have the necessary characteristics.[99]

Are transparency rules breached?: No. The tender documents are meticulously prepared, made publicly available, and are at the disposal of all candidates/tenderers. Offers are opened in a public procedure. All other measures guaranteeing the transparency of contracting authority actions are taken in accordance with the respective type of procedure.

What corruption loopholes are opened?: In this case the infringement itself and the corruption loopholes it opens tend to blend, since the termination, or the use of the legal loophole to continue the procedure are employed precisely with the purpose of carrying out corrupt activities. This type of infringement would not exist on its own (or at least would not pose such a threat to society, if it had to do with non-provision of information by the contracting authority or inappropriate selection motivation) if the respective corrupt intent were not also in place.

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[99] In this connection, the ECJ, in its preliminary ruling dated 11.12.2014 in Case C-440/13 *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza (AREU),* ECLI:EU:C:2014:2435, 11.12.2014, ruled that derogation from the principle of the finality of findings of criminal liability, as expressed in Directive 2004/18/EC, Art. 45 is possible and that '[a]rticles 41(1), 43 and 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31.3.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, where the conditions for the application of the grounds for exclusion set out in Art. 45 are not fulfilled, that article does not preclude the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded'. In this way national contracting authorities are given the option *per argumentum a fortiori* to terminate procedures with one remaining candidate where there are concerns regarding the personal characteristics of the said candidate (even without an effective judgment).

As discussed above, cancellation is often used as a desperate measure when none of the other available corrupt mechanisms is able to bring about a victory for the preferred supplier, contractor or service provider. In the opposite case, when a procedure is not terminated in spite of statutory requirements for such a step, the contracting authority usually strives to 'save' the procedure and validate the procurement, once again with the purpose of securing the contract for its favourite.

Participation and award to 'related parties'. Conflict of interest. Bid rigging

Which legal provisions are infringed?: Article 47, para 5, item 1,[100] Article 68a of PPA;[101] the principles of fair and loyal competition, as set out in the Procurement Directives and the New Procurement Directives.

What does the infringement involve?: The infringement consists of the unlawful existence of different 'connections'[102] between participants in the procedure which limit competition and render pointless the severity of PPA rules on procurement award.

Three types of 'relations' can be distinguished in this context, to illustrate the subject of this type of infringements:

The first type can be labelled '*unlawful (vertical) relations*'. This concept covers the relations between contracting authority and candidate/tenderer. Unlawful relations create prerequisites for corruption and conflict of interest[103] and are consequently prohibited by the law by

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[100] PPA, Art. 47(5), it. 1: 'The following candidates or tenderers may not participate in a public procurement award procedure: 1. whereof any persons covered under Paragraph (4) [*e.g.*, managers of limited partnership companies, natural person merchants *etc.*] is affiliated with the contracting authority or with any holders of a position of responsibility at the organisation of the said contracting authority'.

[101] PPA, Art. 68a(1) & (2) of PPA '(1) The committee shall notify the contracting authority where, in the course of the work of the committee, reasonable doubts arise that tenderers have entered into agreements, resolutions or concerted practices [...]. (2) In the cases referred to in Paragraph (1), the contracting authority shall notify the Commission on Protection of Competition. Any such notification shall not suspend the conduct and completion of the procedure'.

[102] Including agreements which are not based on the exercise of control between the parties.

[103] Directive 2014/24/EU now provides a definition to 'conflict of interests' as part of the package of anti-corruption legislative measures which the New Procurement Directives envisage, according to which where such conflict cannot be prevented, it can serve as grounds for possible exclusion of the participant: Art. 24 - 'Member States shall

means of the statutory provision quoted above. This type of infringement is also mainly committed by municipalities and certain administrations, usually in the case of award to municipal companies. Construction, services and supplies contracts are awarded to related parties,[104] which can exercise control over the contractor either by means of participation in ownership or participation in management bodies.

The second type of connection posing a risk of corruption, can be defined as '*unfair (horizontal) relations*'. This term refers to participation in the procedure by one or more candidates/tenderers which are related between themselves, with the purpose of manipulated obtaining of the contract, at a higher price.[105] Unfair relations were only prohibited by the PPA in one of the latest amendments of 2014, with the introduction of the express provision that '[r]elated parties or related undertakings[106] cannot act as independent candidates or participants in one and the same

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ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure'.

The PPA currently uses the definition of the term 'conflict of interests' as set out in Art. 2, para 1 of the Conflict of Interest Prevention and Ascertainment Act: 'A conflict of interest arises where a public office holder has a private interest that may affect the impartial and objective execution of the official powers or duties thereof'.

104 §23a Supplementary Provisions of PPA: ''*Related parties*' shall be: (a) lineal relatives up to any degree of consanguinity; (b) collateral relatives up to the fourth degree of consanguinity inclusive; (c) affines up to the second degree of affinity inclusive; (d) spouses or de facto cohabitees; (e) partners; (f) any two persons, of whom one participates in the management of the corporation of the other; (g) a corporation and a person who holds more than 5 per cent of the voting interests or shares issued in the corporation. A corporation whereof the capital is wholly state-owned or municipal owned and a person who exercises the rights of the state or of the municipality, as the case may be, in the said corporation shall not be persons having close links'.

§24 Supplementary Provisions of PPA: ''*Affiliated undertaking*' shall be any undertaking: (a) whereof the annual accounts are consolidated with those of the contracting authority, or (b) over which the contracting authority may exercise, directly or indirectly, a dominant influence, or (c) which may exercise a dominant influence over any contracting authority covered under Item 5 or 6 of Art. 7 herein, or (d) which, in common with any contracting authority covered under Art. 7 [*i.e.*, the classical contracting authorities] herein, is subject to the dominant influence of another undertaking'.

105 The use of subcontractors–related parties may also be defined as a subcategory of this type of manipulation.

106 See *supra* note 103.

procedure.'[107]

> 'The mechanism of participation of related parties in a competition or tender consists in their offering different prices and other terms and conditions. The winner among them is the one offering the lowest price or best comprehensive indicators under the 'most economically advantageous tender' criterion. This candidate will subsequently decline the contract […]. The tender will then be awarded to the next related party but at a higher price or more unfavourable conditions for the contracting authority.'[108]

In addition, the third type of relationship is again 'horizontal', along the candidates/participants axis, but does not arise from the exercise of control but rather from the establishment of '*concerted practices*'[109] (*i.e.*, bid rigging) between them. Bid rigging in public procurement attracted the attention of the CPC in earnest only in the last few years because it was found (at European level as well) that this is a method for massive restriction of competition and manipulation of the results of tenders and public procurement procedures in the course of which Member States lose considerable funds. According to the New Procurement Directives, bid rigging may now serve as a ground for exclusion of candidates from a public procurement procedure.[110]

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[107] PPA, Art. 55(7) PPA.

[108] ed. Danev, B., Kolev, K., Todorova, S. (2005) *Monitoring public procurements. Common infringements and corruption practices*, Sofia: Bulgarian Industrial Association, p. 16.

[109] According to the Competition Protection Act, (*Закон за защита на конкуренцията*, promulgated SG 102/28.11.1998, as amended), Art. 15, the following shall be prohibited: all types of agreements between undertakings, decisions by associations of undertakings as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition on the relevant market, such as those which: 1. directly or indirectly fix prices or other trading conditions; 2. share markets or sources of supply; 3. limit or control production, trade, technical development or investment; 4. apply to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage; 5. make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or in accordance with commercial usage, have no connection with the subject of the main contract or to its performance. 2) Any agreements and decisions referred to in paragraph (1) shall be null and void'.

[110] Directive 2014/24/EU, Art. 57(4)(d) provides that contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator 'where the

Are transparency rules breached?: Publicity and transparency rules applicable to the notice, the selected type of procedure and the conduct of the procedure, are usually not breached. In these types of horizontal relationship between candidates/participants, transparency is by no means impaired as the contracting authority is not part of the circle of perpetrators and, usually, is meticulous as to advertising and publicity of the tender and its own actions. In the case of vertical relationship, which also results in conflict of interests between participant representatives and the contracting authority, it is possible that transparency principles may be breached as the agreement between those involved in the bribery/the kickback could be established as early as the procurement Announcement Phase or else additional information could be withheld from other participants in the course of the subsequent procedure phases.

What corruption loopholes are opened?: All types of relatedness open up corruption loopholes during the Procedure Conduct Phase:

Unlawful relations cause conflict of interest and distort the market, but do not necessarily bring about huge financial loss for the contracting authority, since the latter does not always benefit from such corruption schemes, except in cases of diverting of funds towards municipal companies.

Unfair relations and *Bid rigging* may also exist as independent infringements which are not related to corrupt schemes, may be combined with another of the infringements discussed so far, involving bribing of the contracting authority so that a more complicated corruption scheme may be implemented which includes all participants in the procedure and seeks selection of a pre-determined contractor. However, these infringements pose serious risks of considerable expense 'from the taxpayers pocket' for one and the same volume of activities, which means poor effectiveness of the procurement procedure and private gain for the winning supplier, contractor or service provider. What is more, these two connections along the horizontal axis are much more difficult to detect, especially bid rigging, bearing in mind that control bodies in public procurement

contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition'.

generally focus on the actions or inaction of contracting authorities and not so much on those of participants. Concerted practices may be established solely by the CPC, as part of a procedure separate from the appeal procedure, initiated upon alert or self-initiated by CPC.

Unreasonably favourable offers

Which legal provisions are infringed?: Article 70, para 1 of PPA,[111] Article 55 of Directive 2004/18/EC and Article 57 of Directive 2004/17/EC. The Procurement Directives refer to cases of an 'abnormally low tender', while the Bulgarian legislator discusses all cases of 'suspiciously' more favourable conditions. In the New Procurement Directives the change arises from the social commitment of the new rules, namely that contracting authorities would be obliged to reject the tender, where they have established that the tender is abnormally low because of non-compliance with obligations in the fields of environmental, social and labour law. [112]

What does the infringement involve?: The infringement involves PPA-regulated elements of the public procurement that are also used as evaluation indicators. This creates a prerequisite for their being inflated by candidates without any significant benefit to the contracting authority. Classic examples in this respect are those in which (a) candidates/tenderers extend the proposed warranty service period beyond all measure (proposing, for example, a period of 40 or 50 years) or (b) reduce the execution period in order to obtain the contract although the time period they have set is completely unrealistic. The PPA provides the evaluation committee with the option to eliminate a tenderer from the procedure (under certain conditions and following submission of a justification by the respective candidate) for having made a proposal which is 20% more

[111] PPA, Art. 70(1): 'Where the tender of any tenderer contains a proposal on a numerical basis which is subject to evaluation and which is 20 per cent more favourable than the average value of the proposals of the rest of the tenderers under the same criterion applied in the evaluation, the committee must require from the said tenderer a detailed justification in writing of the manner of formation of the said proposal. The committee shall allow reasonable time for submission of the said justification, which may not be less than three working days from the receipt of the request therefor'.

[112] Directive 2014/24/EU, Art. 69(3), 2nd subpara; Directive 2014/25/EU, Art. 84(3), 2nd. subpara.

favourable than the proposals made by remaining candidates. In this case the committee acts at its own subjective discretion and is not obliged to eliminate such a tenderer. The provisions of Article 70 may also be circumvented if all or most tenderers introduce, by way of manipulation, similar unrealistic proposals (*e.g.*, bid rigging, as discussed above). Complex public procurements with complicated constituent elements make the detection by control bodies of artificially enhanced offerings (in such a high percentage) very difficult. In such cases 'it must be established, for each parameter of the proposal which can receive a numerical expression, what proposals were made by all other tenderers in the open procedure, these must be then compared and only then can it be identified whether a specific offer proposes, under a certain parameter, 30[113] percent more favourable conditions than other tenders.'[114]

Are transparency rules breached?: Once again, as with the other infringements at the Procedure Conduct Phase, this type does not breach the principle of transparency as all requirements for the assurance of publicity and equal access to identical information for all candidates/participants have been duly observed.

What corruption loopholes are opened?: 'More favourable' offers allow a tenderer who, at least at first glance, was selected by the contracting authority precisely with a view to expedient spending of public funds, to obtain the contract through unfair means. By bribing the contracting authority, the candidate justifies its abnormally low/favourable offer in accordance with the law; the contracting authority accepts this justification as sufficiently exhaustive, and the candidate becomes the selected contractor. The undefined and ambiguous phrasing of the PPA and the Directives (in both the old and the new procurement package) such as 'originality of the work' or 'any exceptionally favourable conditions available' which allow the contracting authority to decide not to eliminate the candidate also facilitates this type of corruption scheme, which eliminates other candidates, and ensures the painless selection of the desired candidate. In the long run, the 'successful tenderer' is not only unable to meet the indicators set out in its own offer, but is often unable to

[113] Previous versions of the PPA stipulated for a percentage difference of 30%.

[114] Decision No 698/26.3.2013; Administrative Court, Burgas, panel XIII, Judge Evtimova.

complete the contract.

As has been observed, some of the infringements at the Procedure Conduct Phase are easier to detect due to the significantly larger document flow and also the requirement for justification of evaluation committee decisions, while others require serious analysis of the respective situation by control bodies. The absence of options for direct appeal of the subjective decisions of the committee is also an issue. Appellate and control authorities should be able to prove lack of motives or purely perfunctory motivation of the decisions (see the decision in the *Tabakov - Chaushev* case below), but only upon appeal of the decision by the contracting authority itself. What is most noteworthy, however, is the conclusion (similar to that made regarding the Announcement Phase), that infringements at this phase are carried out against the background of adequate publicity and transparency ensured throughout the entire process of submission of the tenders, their opening and evaluation (see the description of the catalogue of rules ensuring transparency and publicity in chapter 1 of the present research). The majority of these infringements result in a considerable loss of public funds, caused not only by the deviation from legal rules but mainly because of the involvement of corruption schemes in their perpetration, which automatically precludes the protection of public interest.

2.4. CONTRACT IMPLEMENTATION PHASE

Unwarranted amendments or infringements in the course of implementation of public procurement contracts

Which legal provisions are infringed?: Article 43, par. 1 and 2 of PPA.[115] Since the issue of possible exceptions in the case of modifications

[115] PPA, Art. 43(1) & (2): '(1) The parties to a public procurement contract may not amend the said contract. 2) An amendment to a public procurement contract shall be performed by means of an additional agreement and shall be admissible on an exceptional basis: 1. where, for reasons brought about through unforeseen circumstances: (a) the time limits of the contract cannot be complied with, or (b) activities within the subject matter of a procurement of works or service have to be partially replaced, where this is in the interest of the contracting authority and does not lead to an increase of the value of the contract, or (c) full or partial replacement of goods included in the subject

to a concluded public procurement contract has not been explicitly covered by the Procurement Directives, the New Procurement Directives codify the preliminary ruling in the *Pressetext* case,[116] so that Article 72 of Directive 2014/24/EU sets out the possible scenarios for contract modification.[117]

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matter of a procurement of supplies, including of elements, components or parts thereof, is required, where this is in the interest of the contracting authority, does not lead to an increase of the value of the contract and the replacement goods comply with the requirements of the technical specifications and possess technical advantages and/or better functional characteristics as compared to the replaced goods, or (d) the total value of the contract has to be reduced in the interest of the contracting authority owing to a reduction of the agreed prices or of agreed quantities or abandonment of activities, or 2. *repealed*, or 3. upon change of state-regulated prices, where an activity whereof the price is subject to state regulation is a principal subject matter of the public procurement contract and the period of performance of the said contract exceeds twelve months, or [...]'. *etc.*

[116] ECJ judgment of 19.6.2008 Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH, APA Austria Presse Agentur registrierte GmbH* [2008] ECR I-4401.

[117] Directive 2014/24/EU, Art. 72 (1) provides that '[c]ontracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases: (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement; (b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor: (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority. However, any increase in price shall not exceed 50 % of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive; (c) where all of the following conditions are fulfilled: (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; (ii) the modification does not alter the overall nature of the contract; (iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive; (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either: (i) an unequivocal review clause or option in conformity with point (a); (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Art. 71; (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4. Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the OJEU. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Art. 51.'

What does the infringement involve?: At present, there are several situations in which amendment of the public procurement contract is possible with respect to its main parameters (*i.e.*, 'time limits' and 'price') provided that the conditions set out in the PPA are present.

Due to the existing ban, dating from 2006, on amendments to public procurement contracts which have already been concluded, infringements in the form of 'annexed contracts' have significantly dropped in number (according to PFIA data for 2012, there were 94 cases among the procedures inspected in which annexes to the public procurement contract were concluded amending prices, implementation deadlines *etc.*, in the absence of legal grounds for such amendments).[118] Nevertheless, control bodies continue to come across cases in which PPA-established grounds for modification of contract conditions are unjustifiably used or '[o]ften contract amendment is not formalized by means of addendums or additional agreements but simply regarded as a fact. For example, inspections often establish cases in which the contractor has invoiced, and the contracting authority has subsequently paid, higher unit prices than initially agreed (this being observed most often in the supply of foodstuffs) or cases in which contract implementation extends over a period of time exceeding the one initially agreed between the parties, with the knowledge but not the opposition of the contracting authority (and often without any delay damages being sought).'[119] A similar infringement can also be perpetrated by signing a contract presumably on the basis of an existing framework agreement but with significantly modified conditions compared to those set out in the framework agreement.

Due to the fact that control bodies are able to detect amendments to existing contracts relatively easily (on the basis of existing payment documents), in recent years corrupt practices have shifted towards misuse in the course of contract performance itself. In the case of complex contracts for supplies and construction works, measuring compliance of

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[118] See the comment in chapter 2 to the effect that the PPA tends to be overly restrictive with regards to contract modification arguing that this restrictiveness is an effective anti-corruption measure. This, in fact, only serves to obstruct the work of reliable partners in public procurement, while corrupt schemes are carried out through verbal agreements which are not reflected in the contract.

[119] See *supra* note 35; p. 5.

actual performance against the offer and the contract is much more difficult and often requires expert investigations, assigned by control and appellate authorities. Precisely for this reason it appears that the New Procurement Directive rules codifying *Pressetext* will not be fully effective against corruption since verbal agreements cannot be regulated and remain outside the scope of the rules.

Despite the numerous supplements and amendments to the PPA in this respect, actual implementation of public procurement contracts remains outside the focus of the PPA and of the control functions provided therein (the legislator regards these relations as commercial in nature and therefore not subject to a special regime).

> 'This is valid for the private sector and also for the public sector if we assume that the contracting authority cannot have mercenary motives to waive the rights given to it under the contract, *i.e.*, if we assume that there can be no corruption following contract conclusion, which, indisputably, is an unrealistic assumption.'[120]

Are transparency rules breached?: Yes, although the answer to this question is not unambiguous. In reality, the PPA fails to provide effective mechanisms with which to impose observation of the transparency principle at the Contract Implementation Phase. This means that formally (except in the pure case of 'annexed contracts' in violation of the PPA), transparency vis-à-vis third parties has not been infringed because the procurement as a whole and its separate elements and documents are publicly available, and all participants can make themselves acquainted with their contents. Oral arrangements between the contracting authority and the contractor, however, often remain unverifiable, while the issue of observing the principle of transparency at this stage is very much watered down in the course of pedantic debates about whether the PPA is actually applicable in this case or whether commercial rules should apply under which transparency is not required.[121]

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[120] *Ibid.*

[121] PPA, Art. 45: 'The provisions of the Commerce Act and of the Obligations and Contracts Act shall apply to any unregulated matters in connection with the conclusion, performance and termination of public procurement contracts'.

What corruption loopholes are opened?: Judging from the analysis of recent case law, oral arrangements are most common, introducing amendments to the initially agreed price, extending the period of validity of the contract (in the absence of any statutory grounds for such extension)[122] or negotiating an undocumented agreement between contracting authority and contractor for under-budgeted or incomplete performance, with the purpose of allocating unspent resources between the two parties. Due to the absence of subsequent quality control, such practices are hard to prove and expose. With the 2014 amendments to the PPA, NAO and PFIA will be able to exercise control over contract implementation as well. Given the insufficient capacity of these two bodies and their financial limitations it is uncertain whether this legislative change will simply remain 'on paper' with control bodies failing to detect a significant number of modifications to contract parameters, especially those which concern 'grand' corruption and usually require a much more thorough and comprehensive analysis.

Pashev, Dyulgerov and Kaschiev expand the above situations in which this type of infringement occurs by looking into the behaviour of the future contractor at the stage of tender submission.[123] In their opinion the party resorting to bribery will submit a tender quoting a much lower price in comparison to the level of quality proposed (in order to justify 'selection' by the contracting authority) in the full knowledge that quality will not be a decisive factor during subsequent contract performance.

Infringements at the Contract Implementation Phase can be brought under the common umbrella of 'unjustified amendments', although the different manifestations may, in this case, also be numerous: a) the contracting authority pays for goods, services and construction works at prices higher than the national average; b) the contractor invoices the contracting authority activities which have not been performed; c) in the event of poor performance the contracting authority fails to make use of available remedies and fails to seek agreed liquidated damages *etc*. Once

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[122] In this context, see Decision No 101/27.6.2013, Administrative Court of Gabrovo; Judge G. Kosev, Decision under Criminal case No 123/27.6.2013 of the Regional Court of Veliko Tarnovo, Judge P. Tsankov; Decision under Criminal Case No 1269/11.11.2011 of the Lovech Regional Court, Judge G. Marinova.

[123] See *supra* note 4, pp. 33-34.

again, as is the case with the previous two phases, violation of transparency rules is not the focus of these manifestations and corrupt mechanisms require much more profound control than the simple, formal requirement for publicity. The definition used by Wensink and Maarten de Vet applies in full force to this type of infringements, namely that '[v]ery often, corruption is a hidden offence, with – in most instances - no obvious victims, damage and with most importantly, two or more parties involved that have everything to gain by being silent and acting discreetly.'[124]

3. ONE VERDICT, AMONG... FEW

In order to illustrate more clearly everything described so far, the following emblematic Bulgarian case from 2010 which (following appeal to all instances) finally resulted in a conviction at the beginning of 2014, is instructive.

3.1. BACKGROUND

In 2009 a Bulgarian municipality (*i.e.*, Dulovo municipality) announced a public procurement procedure for the supply of engineering services for improved drinking and waste water infrastructure under Operational Programme 'Environment 2007-2013'. The municipality was represented by Mr. Tabakov (as mayor of Dulovo). An expert committee was appointed, chaired by Mr. Chaushev, (a former municipal official). Tenders were submitted by candidates 'K', 'P' and 'D'. On the basis of the report of the committee, which eliminated candidates 'K' and 'P', the contracting authority chose candidate 'D' as contractor, with an offer of over BGN 28 mln. (or over EUR 14 mln.). Following promulgation of the choice of contractor, namely candidate 'D',[125] candidate 'K' appealed the

[124] See *supra* note 1, p. 58.

[125] It must be noted that the main line of business of candidate 'D' was bus service and repair and not construction work and also that the company was managed by Mr. Tabakov's brother.

decision before the CPC, claiming that there was a conflict of interest.[126] The appeal suspended contract implementation. CPC failed to find violations in the procedure. Thus *ex ante* control over the public procurement was brought to an end. There is no information regarding any appeal of the case before SAC, nor of any alert to the PFIA, related to the procurement in question, nor is there information of whether the procurement was included in the control plan of PFIA or NAO. Much later, in 2011, and only after candidate 'K' alerted OLAF to the case, the Bulgarian Prosecutor's Office decided to act on its own initiative and initiated criminal proceedings, mainly for political reasons (because Mr. Chaushev was a Member of Parliament). In the end, after several years and court instances, the criminal proceedings were concluded with an effective sentence issued by the Supreme Court of Cassation. This can, somewhat cautiously, be declared a precedent against the background of the limited number of corruption practices detected in public procurement which have ended with a sentence.[127] Tabakov and Chaushev were convicted of abuse of office and imprisoned.[128]

3.2. INFRINGEMENTS FOUND

Inclusion in the contract documents of requirements which unreasonably restrict participation in the procurement and/or offer an advantage to one of the tenderers

The procedure was initiated and approval was granted to the relevant documentation and the public procurement notice, which listed the selection criteria including minimum requirements to the economic and financial standing of the candidate or tenderer, its technical capabilities and qualifications, which, however, did not correspond to and were not

[126] Which conflict of interest was later confirmed by the Criminal court, as noted below.

[127] Especially in comparison with other Member States, where the judiciary pays much more attention to this area, as will be discussed in the following chapters.

[128] Tabakov was sentenced to five years of deprivation of liberty and suspension of capacity to hold or to be appointed to public office for a period of six years. Chaushev was sentenced to four years of deprivation of liberty, and to suspension of capacity to hold or to be appointed to public office for a period of five years.

coordinated with the complexity of the subject matter and the scope of the procedure. Tenderers were required to provide evidence for 'the necessary technical equipment for performance of the works' but there was no further specification as to what such equipment should include although the practical implementation of the procurement would require technical equipment of significant volume and quality. Hence there was a deliberate failure to specify what the equipment should include; no reference was made to the minimum number of machines and facilities. This formulation of the requirement was so vague and general that it was as good as omitted. The logical question inevitably arises as to *what equipment would be deemed 'necessary'?* The possibility for a subjective evaluation was deliberately left open.[129] No requirement for proof of turnover from construction activities was required but only information on the general turnover of the candidate – thus the contracting authority could not assess whether the tenderer has the necessary potential to complete the contract. This left a loophole for non-specialized companies with no experience in construction, such as tenderer 'D', to obtain the contract.

As proof of business reputation tenderers were required to submit references (letters of recommendation) from at least three contracting authorities but there was no requirement for these recommendations to match the subject matter of the procurement. A requirement was made for the tenderer to have at its disposal the funds (own and borrowed) necessary for realization of the contract, and, as evidence of such funds, the candidate was required to submit a bank reference indicating financial stability, but no reference was made as to the minimum amount of such bank reference.

Infringement of, and changes in, the evaluation methodology

The methodology of tender evaluation, approved by means of the tender documentation, was deliberately changed. The approved methodology provided that bids would be evaluated so as to ascertain the most economically advantageous tender. Three factors would be taken into account: (a) implementation period, (b) warranty period and (c) proposed

[129] Sentence dated 12.12.2011 under Criminal Case No 5760/2010 on the register of Sofia City Court, Criminal Department, panel XXIV.

price. Each factor would be evaluated by means of a separate mathematical formula. The contracting authority, instead of applying the evaluation methodology for the three indicators as announced in advance, introduced a new, subjective criterion with regards to the implementation period – 'inadmissibility and unreasonableness.' Further, under the 'warranty period' factor, tenders were not evaluated at all.

Unjustified elimination of tenderers and continuing ahead with the procedure with the single remaining candidate

An unreasoned decision for selection of the performer was issued and unreasoned findings in the report of the evaluation committee were adopted, in which the 'time limit for contract performance' factor was viewed as a basis for elimination although no requirement for a minimum period had been set. In this manner, tenderer 'D' was ranked first and selected as contractor for the procurement, although 'D's' tender failed to meet the requirement set out in advance by the contracting authority,[130] and although the said tenderer had proposed a longer period of implementation and shorter warranty period compared to the two other candidates.[131] This decision eliminated, for no obvious reason, the other candidates who fully complied with the preliminary conditions. The obligation of the contracting authority to terminate the procedure given that the bid submitted by the only remaining candidate – tenderer 'D', ranked first, failed to meet the preliminary conditions, had not been observed. In addition, the court found sufficient evidence that the preferred company - 'D' - supported the

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[130] (i) The certificate of registration in the Central Register of Professional Builders submitted with the offer does not meet the requirements of the contracting authority as set out in the tender notice;

(ii) The submitted professional liability insurance for the respective group and category of construction works does not meet the requirements for a minimum insurance amount for construction works of the type stipulated in the procurement;

(iii) The list of own and hired technical equipment, construction machinery and mechanisation does not contain the required documents evidencing origin and ownership of the same.

[131] Candidate 'K' offered an implementation term of 400 days and 50 years guarantee, candidate 'P' – 540 days for implementation and 50-year guarantee. The winner, candidate 'D', offered to complete the contract for 1004 days and gave only 15 years guarantee. Despite this, one of the committee's members – a hydro-melioration expert – ruled that the offers of candidates 'K' and 'P' were unrealistic and the committee prepared a report proposing elimination of those two participants from the competition.

financial and economic interests of the brother of one of the defendants.[132]

A contract for the sum of BGN 28,876,258 (approx. EUR 14,780,709) net of VAT was nevertheless concluded. The municipality of Dulovo undertook to pay this sum to the contractor 'in order to secure financial gain for 'D'' which would in turn cause damages to the municipal budget and consequences of no negligible amount for the municipality, namely BGN 11,132,025 (approx. EUR 5,698,080). This sum comprised the difference between the price offered by 'D' under the contract and the actual value of construction and mounting works at market prices valid at the time, and also serious injury to the reputation of and trust in local administration.[133]

According to the judgment:

> 'The criminal activities of the two defendants reveal a high level of organisation and conspiracy. These activities have also drawn and involved other municipal administration officials. The potential pecuniary and non-pecuniary damages which would have been incurred by the municipality of Dulovo are huge. All this demonstrates an exceptionally high degree of threat to society on behalf of both the offence and the perpetrators themselves'.

For those and several other infringements, the court found the defendants guilty, having committed an offence under Article 282, par. 2, item 2, with reference to par. 1 and with reference to Article 20, par. 2 of the Bulgarian Criminal Code.[134]

The above case is a very typical example of a scheme for siphoning off funds from the municipal budget, which comprises several different violations aimed at, ultimately, ensuring (a) benefits for the contracting

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[132] 'An official who violates or does not fulfil his official duties, or exceeds his authority or rights with the purpose of obtaining for himself or for another benefit or to cause somebody else damage which can cause major harmful damages, shall be punished by imprisonment of up to five years […]. If the act has caused substantial consequences or it has been committed by a person who occupies an important official position the punishment shall be imprisonment of one to eight years, whereas the court can also rule […]'. Judgment of 12.12.2011 in Criminal case No 5760/2010 on the register of Sofia City Court, Criminal Department, panel XXIV.

[133] *Ibid.*

[134] Criminal Code, (*Наказателен Кодекс*, promulgated SG 26/2.4.1968, effective as of 1.5.1968, as amended).

authority, represented by the mayor; (b) benefits for the chairman of the committee who is bribed to act in the interests of the winning candidate; (c) benefits for the winning candidate firm which not only wins a contract at a value much larger than the realistic price but would have been, most probably, unable to fulfil its contract obligations. This set of violations, conflict of interests and corruption techniques results not only in a considerable financial loss for a relatively poor municipality, but also seriously compromises the administrative apparatus at municipal level.

Another conclusion is that of all the violations of the PPA, transparency is the least affected. The requirements made of candidates were clearly announced and promulgated. The notice, although ambiguously formulated and allowing quite a broad interpretation of the needs of the contracting authority, was not appealed. The change in methodology in the middle of the procedure does, indeed, violate the publicity principle but, in reality, the scheme serving to eliminate the other candidates hangs almost entirely on the decisions of the corrupt committee and not on concealed information or information that has been incorrectly presented to candidates. Competition is restricted at the contractor selection level thus allowing the procedure to proceed and the only remaining participant to waltz through the selection process to be selected as the contractor.

4. SUMMARY OF FINDINGS

The list of infringements occurring in the course of the four phases of public procurement procedures can always be supplemented with other types of corrupt practices and specific infringements of the law or combinations thereof,[135] depending on the type of procedure selected or the exact phase in which they occur. The conclusions, however, would not significantly differ from those already drawn above.

According to the First EU Anti-Corruption Report 2014, the

[135] See ed. Nusheva, V., Marinova, V., Georgiev, I., Toneva, L. (2007). *Corruption offences in the award of public procurements in Bulgaria*, Collective work of Transparency International Bulgaria, Sofia.

following types of infringements are most common:

> 'Bulgarian respondents from the business sector perceive the following practices as being widespread in public procurement: involvement of bidders in the design of specifications (36%), unclear selection or evaluation criteria (49%), conflicts of interests in the evaluation of the bids (57%), specifications tailor-made for particular companies (58%), abuse of emergency grounds to justify the use of non-competitive or fast-track procedures (33%) and collusive bidding (41%). 66% considered that corruption is widespread in public procurement managed by national authorities (EU average: 56%) and 78% thought this was the case with local authorities (EU average: 60%).'[136]

Analysing the different types of infringements and their occurrence in the course of public contract award and performance, a number of findings ring true:

Against the background of the complicated bureaucratic procedures imposed by the PPA in compliance with the Procurement Directives, as well as the numerous additional requirements of national law (summarized in chapter 1), most infringements, opening up corruption loopholes are, at the same time, meticulous in terms of observing publicity and transparency principles. In this context, a large portion of seemingly impeccable procedures turn out to be precisely those in which 'grand corruption' is perpetrated, with the subsequent loss of significant financial resources.

Of course, in addition to purely economic harm to society, corruption in the field of public procurement results in severe restriction of competition in that sector. As the above examples show, the actual contract price can be lowered and the bribe securing favourable treatment for the supplier, contractor or service provider can take the form of incomplete performance or performance of poor quality. According to theory '[s]urplus income generated by the lack of competition, although more visible for each individual transaction is hard to calculate at macro level. If we assume that such income is allocated equally between the parties in a

[136] *First EU Anti-Corruption Report.* (2014), Brussels, COM(2014) 38 final, Annex 2 Bulgaria, p.10.

corrupt transaction, this would mean that loss for the budget would constitute approximately double the amount of bribes in the field.'[137]

Despite all this, the analysis in this chapter reveals that at national level the administrative portion of the procedure is regarded as being of greater significance than the subject matter of the procedure. This view reflects strongly how control over the award and execution of public procurement contracts is carried out. Control bodies monitor only the strict observance of the law and of the specific set of documents required by contracting authorities. The lack of human resources and financial capacity of control bodies hinders the detection of sophisticated corruption schemes including deliberately convoluted technical requirements or intricate evaluation methodologies. Given the lack of control over the subjective evaluations of the evaluation committees, these infringements often remain invincible. Well-contrived manipulation mechanisms can also be implemented at subcontractor level or at the level of associations between several enterprises, which makes detection an even greater challenge.

Søreide's observations are very much to the point here: 'some elements important to understand the risk of corruption in public procurement are: The *amount of money* involved, the *complexity* of the technology involved, the *urgency to acquire* the goods or the *immediacy* of the project, as well as the *discretionary authority* among the public officials.'[138]

Finally, even when detected, many of these infringements are penalized by means of fines which are disproportionately lower than the actual loss for society. A verdict, such as the one examined, is too rare an outcome to be able to serve as a form of prevention of corrupt schemes. In reality, fiscal damage, restriction of competition, market distortion and the disillusionment of a large portion of candidates who no longer wish to participate in public procurement procedures cause damage to the State which cannot be compensated through the imposition of sanctions, unless these sanctions are able to ensure reduced corruption in the sector.

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[137] See *supra* note 4, p. 28.

[138] See *supra* note 63, p. 13 (emphasis added).

Chapter 6

GERMANY

‘She, not even as large, all in all, as an egg hitherto,
Envious, stretched, swelled, strained, in her zeal
To match the beast in overall size,
Saying, ‘Sister, lend me your eyes.
Is this enough? Am I not yet there, in every feature?’’

Jean de La Fontaine
‘The Frog Who Would Be as Big as an Ox’

So far attention has focused on the main issues in Bulgarian legislation in the field of public procurement, the corruption loopholes left open, and the lack of adequate prevention of corruption, against the background of an excessively large number of transparency rules. This chapter marks the beginning of the section dedicated to benchmarking with the experience of other countries in the same field.

The methodology to be applied for selection of those countries with which the Bulgarian *status quo* could be compared in order to highlight better practices turned out to be a real challenge. Various criteria have been used for selecting the benchmark countries in order to establish a meaningful and logical rationale for placing them on the same plane as Bulgaria.

One of the first reference points was the level of corruption in the country concerned (adopting the highly popular index used by

Transparency International, despite its limitations).[1]

Another important argument for this choice was the state of the public procurement award system in three respects: *first*, its efficiency in the country concerned; *secondly*, existing anti-corruption rules in the field of public procurement (other than excessive publicity and transparency requirements), and, *thirdly*, the extent to which certain aspects of this system could be pinpointed as good practices for Bulgarian legislation and could serve to resolve problems at national level. An attempt was made to answer the question as to which example could be borrowed (in its entirety or at least in part) despite the obvious differences in the economic and social environment of the different countries and that of Bulgaria.

A significant argument for the choice was the existence of historical and substantive similarities between those countries and the Bulgarian legal system. EU Member States, and more particularly those whose legislation does not much differ from that in Bulgaria, were obvious choices.

Perhaps, however, the easiest choice would have been to opt for Scandinavian countries as brilliant examples of corruption limited to a negligible minimum. Similar investigations have already been undertaken in Bulgaria,[2] but the methodology of benchmarking with 'the best example' was found to not be the most suitable for this research, since the application of relatively achievable quantities and of systems which are relatively familiar to Bulgarian legal experts seemed more appropriate (in order to avoid La Fontaine's 'over ambitious frog' effect). As admitted in theory: '[a]mong the world ranking of the countries with lowest levels of corruption in Europe are Denmark, Sweden, Finland and Switzerland. [I]n order to supplement the experience of other European countries in the process of public procurement management, the experience of countries

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1 As already discussed in the chapter 2 of this research.

2 *e.g.*, *Manual of good practices in the field of public procurement and concession appealing*. (2009). Sofia: Bulgarian Competition Protection Commission; ed. Pashev, K., Marinov, K. (2009). *Reducing the risks of corruption and introducing good practices in public procurement management*, Sofia: Governance Monitoring Association and Economic Policy Institute; Pashev, K. (2009). *Reducing Corruption Risks and Practices in Public Procurement: Evidence from Bulgaria*. (2009), Paper presented at the First Global Dialogue on Ethical and Effective Governance (Amsterdam) *etc*.

which, to a larger extent, are closer to the economic realities in Bulgaria must also be taken into account.'[3]

From a historical perspective an attempt was made to identify national legislation that formed the basis of Bulgarian public and commercial law from the post-liberation period[4] onwards – the time when Bulgaria's legal system was conceived, a time characterised by radical reorganisation of public relations and social structures from a feudal to a pro-Western type.

Last but not least, an important aspect of this benchmarking study was the differentiation of those countries which have been, are and are expected to be major investors in Bulgaria. This element of the methodology is essential, given that the participation of foreign companies in national tenders serves as a guarantee for the development and modernisation of public-private relations at EU level, on the one hand, although on the other, there is an ever-narrowing circle of foreign investors as a result of the discouraging effect of corruption on a huge percentage of public procurement in Bulgaria.

All things considered, the countries which came closest to matching these requirements and concepts for a meaningful benchmark analysis appeared to be Germany and Austria; the grounds for the choice of each will be further elaborated in the respective chapter.

The present chapter examines Germany as a subject of comparison and outlines those advantages of the German legal system in the field of public procurement which could be suitably modified and adopted by Bulgaria for the purpose of preventing corruption.

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[3] ed. Pashev, K., Marinov, K. (2009). *Reducing the risks of corruption and introducing good practices in public procurement management*, Sofia: Governance Monitoring Association and Economic Policy Institute; ch. VI; p. 134.

[4] The period after liberation of Bulgaria from Turkish yoke, lasting five centuries, and the restoration of the Bulgarian state is known by the term 'post-liberation period'. Historically this period runs between 1879 and 1920.

1. WHY GERMANY?

Legislative similarities

The first point to be made in this respect is that there are legislative similarities between Germany and Bulgaria. Both legal systems belong to the continental (Romano-Germanic) legal family which suggests a large number of fundamental similarities: one major legal instrument (*Constitution/Grundgesetz*), abstract legal formulas for all legally significant cases, subordination of law enforcement to statutory law, and absence of precedent system typical of the Anglo-Saxon world. A fundamental source of similarities, naturally, is the fact that both countries are Member States of the European Union; thus they are required to conform – regardless of huge social-economic and political-historic differences – to the requirements and policies of European law. On the other hand, the German legal system is also historically connected with the foundation of the Bulgarian post-liberation legal system – the organisation of commercial relations is the result of reception mainly from the German civil code (*Bürgerliches Gesetzbuch*),[5] and the similarities between the two systems is evident even in modern legislation. A large number of Bulgarian legal theorists of the past century were pupils of German jurists and followed the German example in their works.[6]

Investments

In 2013, Germany was the third largest investor in Bulgaria (EUR 199 mln.) according to the President of the German-Bulgarian Chamber of Industry and Commerce (Ruediger Hoeben-Stoermer). According to information provided by the same source, in 2013 commercial transactions between Bulgaria and Germany reached the record volume of EUR 5.3 bln., which marks a 10.5% increase compared to 2012. Bulgaria's exports to Germany exceeded its imports from

[5] First developed in 1881, effective as of 1.1.1900.

[6] Prof. Lyuben Dikov (1895-1973), Dr. Petar Dzhidrov (1876-1952), Prof. Konstantin Katsarov (1898-1980) *etc*.

Germany by half a billion euro.[7] Precisely in this light, during a meeting between the Bulgarian Prime Minister and German business representatives in Bulgaria, the latter expressly raised the question of the problems in Bulgarian public procurement and requested that various steps be taken, such as ensuring 'equal opportunities for all participants in the economy, […], transparent pricing, market conditions, and the creation of an energy exchange to replace insufficiently independent tenders.'[8]

Corruption level

The third factor justifying the choice of Germany is the level of corruption. For 2014, according to Transparency International's CPI, Germany came 12th of a total of 175 countries with a score of 79 (the same as Iceland for the same year).[9] According to the National Integrity System Report for Germany,[10] despite the fact that the general German population regards corruption as a serious problem for the country, in fact only about 2% of those surveyed admit to having been forced to pay bribes. This is a very important aspect when benchmarking the two countries, because, obviously, the perception of citizens regarding the existence of corruption in Germany and the actual situation do not match, as opposed to the situation in Bulgaria, where public perception is a serious reflection of the actual frequency of corruption in different spheres of public significance.

In connection with the level of corruption in Germany and the obviously positive measures undertaken in the field of public procurement, a very indicative source is the statistical data contained in the First EU Anti-Corruption report with respect to public procurement in Germany:

> 'In the area of public procurement, according to the 2013 Eurobarometer business survey, 20% of those who participated in public procurement procedures in the past three years

[7] 24chasa.bg, (2014). [online] Available at: http://www.24chasa.bg/Article.asp?ArticleId=3440413. [Accessed 4.6.2015].

[8] Boikova, M. (2014). [online] Available at: http://m.24chasa.bg/Article.aspx?Id=3442906 [Accessed 4.6.2015].

[9] Transparency.org. (2015) [online] Available at: https://www.transparency.org/cpi2014 [Accessed 4.6.2015].

[10] *National Integrity System Report Germany 2012 (short version).* (2012), Berlin: Transparency International Deutschland, p. 19 *et seq*.

> reported that they were prevented from winning because of corruption (EU average: 32%). Almost all negative practices in the context of public procurement are perceived to be less common than the EU average. Respondents in Germany reported tailor-made specifications for particular companies in 48% of cases (EU average 57%). Collusive bidding was reported to be a widespread practice by 54% of the respondents (EU average 52%). Conflicts of interests in the evaluation of bids were noted by 47% of respondents (EU average: 54%) and 43% reported to unclear selection or evaluation criteria (EU average 51%).'[11]

For the sake of an objective review, it should be noted that regardless of the fact that corruption levels in the field of public procurement in Germany appear negligible when compared to the situation in Bulgaria, Germany also suffers from gaps in corruption prevention which affect the public perception of corruption in the country. Germany's federal structure, the different levels of government in the various regions and the differences in award procedures at local level all play a role in this context. Hence generalisation of corruption levels in Germany is not the best approach. According to a study made by the Max-Planck Foundation[12] and analyses by the Federal Criminal Police Office (*Bundeskriminalamt*) covering 2010-2011, the largest number of corruption cases, greatly exceeding corruption levels in other districts, was detected in North Rhein-Westphalia.[13] In the period after 2012, this situation was addressed, and the total number of corruption offences dropped by 10%, from 1528 to 1373, which is the lowest level of corruption for the previous five years (since 2008).[14] Of course, it must not be forgotten that North Rhein-

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[11] *First EU Anti-Corruption Report*. (2014), Brussels COM(2014) 38 final, Annex 5 – Germany, p. 3.

[12] Hensgen, L. (2013). *Fight against corruption in the Danube region: A study of regional best practices*, Max Planck Foundation for International Peace and the Rule of Law, Sankt Augustin: Konrad Adenauer Stiftung, p.32.

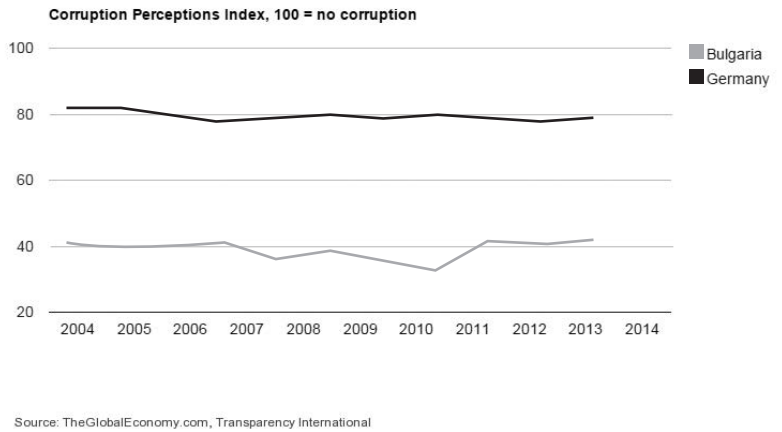
[13] *Ibid* - 'More than 22,800 single corruption offences and bribery in the course of trade were registered in two large investigations alone, namely against employees of an automaker and against civilian employees of the British Army of the Rhine, as well as against their respective contractors.'

[14] *Korruption – Bundeslagebild 2012*; Bka.de (2012). *BKA Korruption*. [online] Available at: http://www.bka.de/nn_193376/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruption__node.html?__nnn=true [Accessed 4.6.2015], p. 3.

Westphalia is one of the largest regions in Germany and consequently one of the first in terms of economic and industrial development; competition levels are, accordingly, much higher than in other regions. Thus, even if the higher levels of corruption appear somewhat shocking, they could be regarded as proportionate to the level of business development in the region.

The following figures from Globaleconomy.com[15] may facilitate comparison with corruption levels in Bulgaria for the last decade:

Fig. 1 Movement of the CPI (2004-2014):



[15] TheGlobalEconomy.com, (2015). *Compare countries, compare economies, compare indicators | TheGlobalEconomy.com*. [online] Available at: http://www.theglobaleconomy.com/compare-countries/ [Accessed 3.6.2015].

Fig. 2 Control over corruption (2004-2014):

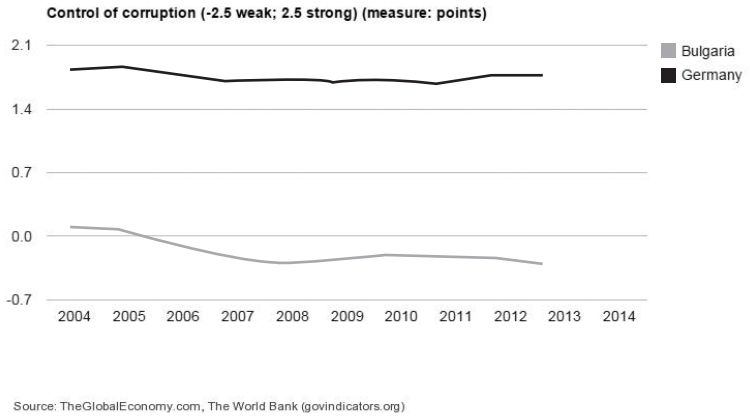
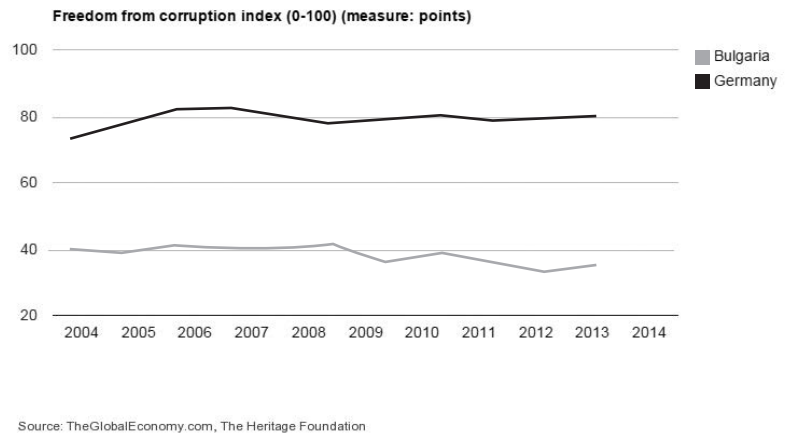


Fig. 3 Freedom from corruption (2004-2014):



Public procurement system

The next factor concerns the public procurement system.[16] The legislative decisions underlying the main parameters and specifics of the German legal system in the field of public procurement reveal several fundamental characteristics (in addition to the more detailed analysis and specific features identified below) which would have a favourable effect on the Bulgarian public procurement award system, provided they are properly implemented and harmonised with Bulgarian reality. These are, firstly, the fact that legislation strives to keep as close as possible to European requirements without overflowing with obscure and overabundant rules for bidders; secondly, that the language of regulations is clear, concise and precludes ambiguous interpretation; thirdly, that an advantage, by default, is given to open procedures, which limits the opportunities for unmotivated conduction of restricted or negotiated procedures, and, fourthly, control and appellate authorities that are both streamlined and efficient.

When selecting Germany it is impossible to ignore the efforts of CPCCOC and the BORKOR Project[17] in the field of reducing corruption in the award of public procurement contracts in Bulgaria. In the formulation of anti-corruption methodology and the elaboration of a model to counter corruption in the field of public procurement, CPCCOC has endorsed the German model – similar to one of the German online platforms (the 'V-Model') for detection of corruption gateways and related to certain elements of German legislation which CPCCOC proposes should be incorporated into the Bulgarian Public Procurement Act. These will be further reviewed below.

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[16] Once again, as a matter of statistics, a note should be made of the fact that the public procurement sector in Germany forms around 17% of national GDP and thus has a serious impact on the economic welfare of the country. The annual volume of public procurement in Germany is huge. According to the Annual Procurement Review 2011 of the European Bank for Reconstruction and Development (p. 14 and Annex 3) the awards by country of origin of the tenderers, presented in their value in Euro and by contract type for 2011 for Germany are as follows (i) work contracts – EUR 9,800,809; (ii) supply and installation contracts – EUR 2,202,692; (iii) goods – EUR 201,337; and (iv) consultant services – EUR 59,430. Or, the total value of procurement contracts for Germany in 2011 is EUR 12,264,268, which is actually twice the value of procurement contracts for the same year in Bulgaria *(i.e.*, EUR 6,111,269).

[17] Already discussed in chapter 4 of the present research.

Socio-economic differences

There are, of course, clear social-economic differences between Germany and Bulgaria. Naturally, when comparing the legislative systems, good practices, and efficient methodologies of the two countries account must be taken of their obvious differences, not only in terms of legal characteristics, but also in terms of social-economic, cultural and lifestyle characteristics. By using, as a point of reference, some of the conclusions reached within the National Integrity System Reports of Germany and Bulgaria[18] the main parameters of the two countries which characterise the differences in government and economic status and the perceived reliability and security of the system can be summarised as follows.

Germany: (a) The central political institutions operate effectively, the political system is stable and civil rights in Germany are not compromised; (b) Economic activities in the country have been able to establish sustainable prosperity and a high standard of living; (c) A functioning and stable network of social services and social assistance is in place; (d) Germany has the fourth highest gross national product worldwide behind the USA, Japan and China; (e) There is a consistently high level of trust in the police and the justice system.

Bulgaria: (a) The continuing reforms in Bulgaria have yet to earn back the trust of people in the institutions; (b) Major public funds have been invested in strengthening the public integrity of institutions. Resources are available and there is sufficient institutional capacity, but the public investment of funds has, as yet, not resulted in improvements in integrity and anti-corruption results; (c) Most of the public institutions are not cost-efficient and public resources are spent in vain; (d) The law enforcement bodies (prosecutors and the police) are unable to generate significant public trust and are often criticised by European partners; (e) The judiciary enjoys a high level of independence and autonomy on a legal basis. However, its practice does not provoke trust and faith in the judiciary institution in Bulgaria.

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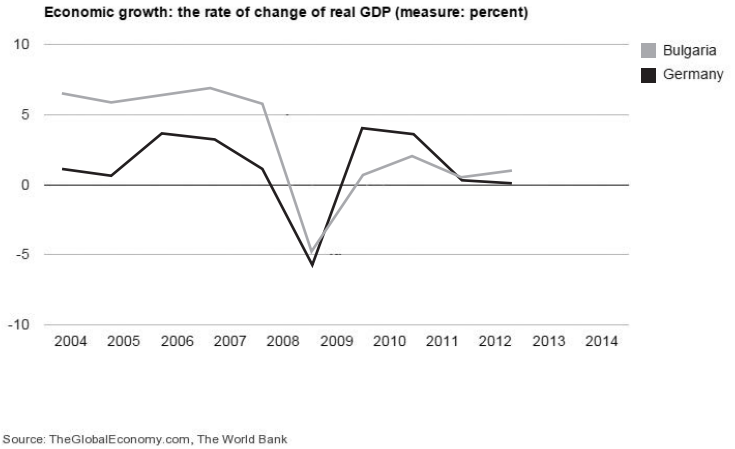
[18] *National Integrity System Report Germany 2012 (short version).* (2012), Berlin: Transparency International Deutschland; *National Integrity System Assessment – Bulgaria Country Report 2011*. (2011), Sofia: Transparency International Bulgaria.

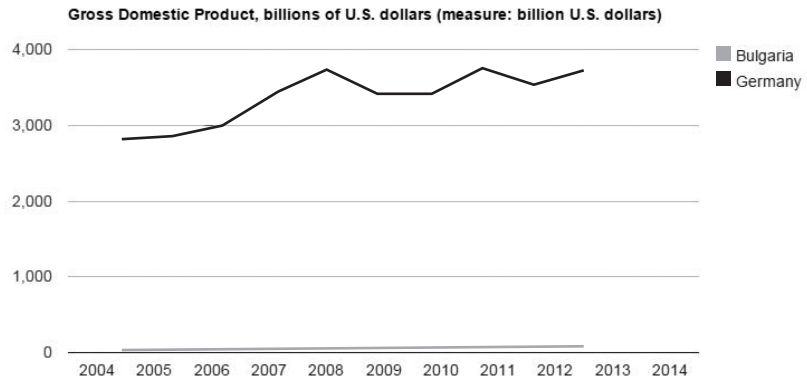
In order to facilitate comparison of social-economic differences, the following figures from Globaleconomy.com[19] demonstrate, without the need for further analysis, the disparities between the two countries per several fundamental parameters: economic growth, GDP, government costs, administration efficiency, regulatory quality:

Fig. 4 Difference in the economic growth (2004-2014):



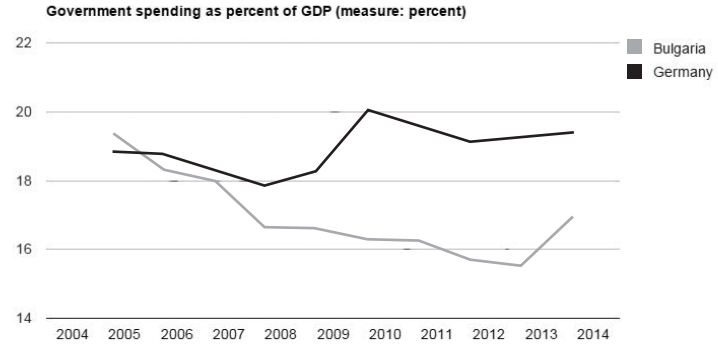
[19] TheGlobalEconomy.com, (2015). *Compare countries, compare economies, compare indicators | TheGlobalEconomy.com*. [online] Available at: http://www.theglobaleconomy.com/compare-countries/ [Accessed 3.6.2015].

Fig. 5 Movement of Gross Domestic Product (2004-2014):



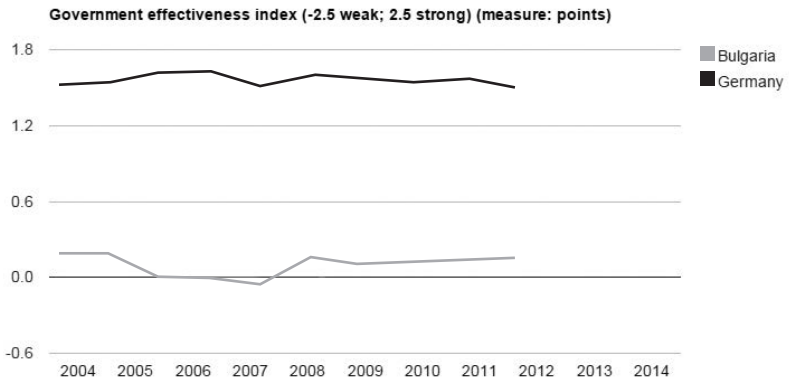
Source: TheGlobalEconomy.com, The World Bank

Fig. 6 Government spending (2004 - 2014):



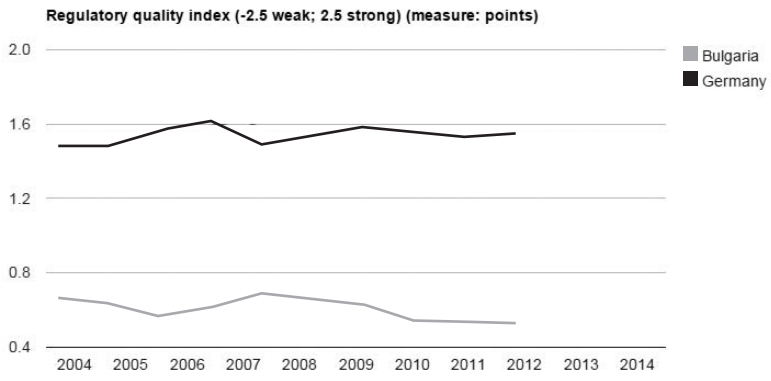
Source: TheGlobalEconomy.com, The World Bank

Fig. 7 Administration efficiency (2004 - 2014):



Source: TheGlobalEconomy.com, The World Bank (govindicators.org)

Fig. 8 Regulatory quality (2004 - 2014):



Source: TheGlobalEconomy.com, The World Bank (govindicators.org)

2. MAIN CHARACTERISTICS OF THE GERMAN PUBLIC PROCUREMENT SYSTEM. APPLICABLE LEGISLATION

As an EU Member State, Germany is subject to EU public procurement law. The Procurement Directives and the Remedies Directive are fully transposed into German legislation and the New Procurement Directives are likely to be transposed within the required period.[20]

With the implementation of the Procurement Directives and the observance of EU thresholds, German public procurement law was, as is the case in other Member States, artificially divided in two clearly distinguished parts – legislation applicable *above* and legislation applicable *below* the thresholds.

This is one of the most significant differences from the Bulgarian model, which, at least in this respect, tends to be more restrictive (and thus resembles the Austrian model, as will be discussed in the next chapter). This restrictiveness, however, is not necessarily a positive feature of Bulgarian law. Given that Bulgaria is also a Member state of the EU, the same European legislation and thresholds apply. However, according to the PPA, there are also national thresholds, which need to be observed. The restrictive rules of the PPA do not apply in full for procurements below these national thresholds.

The main applicable pieces of legislation which regulate the awarding of procurements above EU thresholds in Germany are presented in Part IV of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB),[21] and the German Ordinance on the Award of Public Contracts (*Vergabeverordnung*, VgV).[22] The more

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[20] *i.e.*, April 2016. As per the *Germany Chapter - Public Procurement 2015*. [online] International Comparative Legal Guides. Available at: http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2015/germany [Accessed 3.6.2015], section 9: 'According to the Federal Government, Germany intends to implement a one-to-one implementation of the new directives, in particular with regard to the exclusions of in-house constellations and public-public partnerships'.

[21] Promulgated Federal Gazette I p. 2546 of 26.8.1998, as amended.

[22] BGBl. I S. 321 / 22.2.1994, as amended. By Ordinance of 15.10.2013 VgV was amended with the principal object of lifting the ban on the prohibition of mixing award criteria and suitability criteria for independent contractor services.

specific rules governing the classic and utilities sectors as well as the different types of procurement (public works, supply and services, professional services) are to be found in the new Ordinance on the Award of Public Contracts by Utilities (*Verordnung über die Vergabe von Aufträgen im Bereich des Verkehrs, der Trinkwasserversorgung und der Energieversorgung*, SektVO)[23] and the relevant procurement regulations: *i.e.*, the Procurement Regulation for Public Works (*Vergabe– und Vertragsordnung für Bauleistungen*, VOB/A);[24] the Procurement Regulation for Public Supplies and Services (*Vergabe– und Vertragsordnung für Leistungen*, VOL/A),[25] and the Procurement Regulations for the Award of Independent Contractor Services (*Verdingungsordnung für freiberufliche Leistungen*, VOF).[26]

Pursuant to VOB/A and VOL/A,[27] invitations to tender must be issued whenever the value of a contract equals or exceeds the relevant EU threshold. Where independent contract services are concerned, the applicable legislation for issuing invitations would be the VOF. Below EU thresholds the GWB and the VgV do not apply. The budgetary laws of the federal, state and local governments, as well as the first sections of the VOB/A and the VOL/A are, however, mandatory. Tender notices are published on a national basis only.

Finally, in both cases (below or above EU thresholds), bearing in mind the decentralized federal structure of Germany, the specific laws, rules and manuals of each of the sixteen *Bundesländer* have to be observed, since there are contracting authorities and purchasers (for a particular district) on each separate federal level.

The present study focuses on the fundamental rules of the GWB and the relevant special ordinances and acts which apply to the whole country. The individual acts of the different *Bundesländer* fall outside the focus of the study due to the fact that they can only serve as a representative sample

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23 BGBl. I S. 3110 / 23.9.2009, as amended.

24 20.9.2009, BAnz. 196a / 29.12.1997, as amended.

25 31.7.2009, BAnz. 155a / 15.11.2009, as amended.

26 12.5.1997, BAnz. 164a / 3.9.1997, as amended.

27 §2 and §3 of VOB/A; §2 of VOL/A.

for the *Land* concerned but not for the comprehensive state policy in the sector.[28]

3. MAIN PRINCIPLES. TRANSPARENCY OBLIGATIONS

The basic principles of German public procurement law are, logically, the same as those stipulated in the Procurement Directives applicable throughout the EU – competition, non-discrimination, transparency, equal treatment, right to judicial review.

Given that Part IV of the GWB is 'the flagship in German procurement law,[29] the main principles of public procurement above the thresholds are stipulated in this act.[30] The GWB extends the principles of the Procurement Directives with exact requirements with respect to awards to 'skilled, efficient, law-abiding and reliable undertakings.'[31] The right of participants in the awarding process to ensure compliance of the procedure with all public procurement rules is also stipulated as a general principle of German public procurement legislation. Last but not least, a principle which demonstrates the specificity of German procurement legislation is the consideration and protection of the interests of medium-sized companies,[32] which, as a policy, almost fully reproduces the legislative

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[28] Also outside the scope of this study, with the exception of some sporadic references aiming to highlight the general rule, will remain the rules for the award of concessions, as well as the public procurement regulation on defence and security (*i.e.*, *Vergabeveroednung Verteidigung und Sicherheit*).

[29] Burgi, M. (2012). *Public Procurement Law in the Federal Republic of Germany.* Annual Report - 2012 – Germany, IUS Publicum, p. 5.

[30] The fundamental procurement principles are enshrined in §97(1) and (2) of GWB, Subjective rights are conferred pursuant to §97(7) of GWB whereas the details of judicial review are laid down in §102 - §124 of GWB.

[31] §97(4) of GWB.

[32] Aside from the primary legal protection system for above-thresholds awards, enforceable protection may also be provided by §19 and §20 of GWB and the Act Against Unfair Competition (*Gesetz gegen unlauteren Wettbewerb*, Federal Gazette 3.3.2010, as amended), which are applicable in the case of abuse of a dominant position or unfair commercial practices (such as bid rigging) by German Civil jurisdiction. And lastly, the German Constitution Basic Law (*Grundgesetz*, promulgated Federal Gazette / 23.5.1949, as amended), Art. 3, also needs to be observed, according to which every bidder is to be treated equally by the executive branch to which awarding agencies generally belong.

decisions underlying the provisions of the New Procurement Directives.[33]

With respect to the transparency principle in particular, there are some material rules dealing with publicity and openness throughout the entire procurement process. However, as a whole, transparency rules are remarkably simplified and generalized. There is a variety of well-developed online platforms which publish information on completed tenders.[34] The information is usually limited to basic data such as the contracting authority, the bidder; the type of procedure; the subject and scope of the services; the contract period.[35] Actually, the GWB refers to 'transparency' only once, in Part IV, dedicated to the general rules on public procurement, in §97(1), where the main principles are stipulated:

> 'Contracting entities shall procure goods, works and services in accordance with the following provisions through competition and by way of transparent award procedures.'

The applicable legislation regulating the different types of procurement includes some transparency norms as well, generally relating to the obligation to provide information on e-platforms, as mentioned above. For example, the VOL/A sets out the following obligations:

> 'Furthermore, the following additional ex ante and ex post transparency obligations have been included in VOL/A:
>
> – National notices (*ex ante*) in internet portals must be accessible centrally via a search function of the internet portal www.bund.de.
>
> – In two exceptional cases of restricted invitations to tender, a public call for competitions must always be held.
>
> – Contracting authorities are obliged to provide certain minimum information on every contract awarded, equal to or exceeding EUR 25,000 excluding VAT, following restricted

[33] The mandatory / preferable splitting of public procurements into lots with the purpose of awarding each lot to a different SME, as per §97(3) of GWB, fully corresponds to Directive 24/2014/EU, Art. 46.

[34] For example, www.bund.de; Federal Government's tender platform – e-Allocation; e-Vergabe and others.

[35] In this sense also *Public procurement in Germany: overview, Country Q&A*. (2013) Us.practicallaw.com, (2013). *Practical Law*. [online] Available at: http://us.practicallaw.com/8-521-5162 [Accessed 4.6.2015].

> invitations to tender and single tendering procedures without a call for competitions for a period of three months (*ex post*).'[36]

Another example of a somewhat more detailed approach of legislative rules towards transparency is the provision of the VOB/A § 11 which discusses the creation of a 'buyer's profile', in accordance with the option provided for by the Procurement Directives:

> 'The public client can set a buyer profile on the Internet, where all information such as the point of contact, the telephone and fax number, the postal and e-mail address as well as details on tendering procedures, planned and awarded contracts or discontinued procedures may be published.'[37]

In comparison to the Bulgarian procurement legislation which overflows with transparency rules and obligations (see chapter 1 above), the German approach is rather more basic and constructive. The applicable legislation does not pay excessive attention to detailed norms describing each and every single document and/or step which must be published and made available on several different types of online platforms and media. The idea here (as with all other principles) is rather to stick to the Procurement Directive's requirements and to ensure in practice (and not only in the letter of the law) a clear and transparent approach to the audit of public expenditure.

Even where more detailed provisions exist with regards to transparency, these are left to the discretion of contracting authorities, as is the case with the Procurement Directives as well. The issue of the creation of a 'buyer's profile' and the information to be uploaded has been resolved in a diametrically opposite manner to that adopted by Bulgaria. As has already been noted, one of the latest amendments to the PPA rules made the creation of a 'buyer's profile' mandatory for all contracting authorities in the country, while the information required in reality includes the entire dossier for each public procurement. This imperative requirement further inconveniences the work of contracting authorities while its anti-

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[36] Unofficial translation of VOL/A, preamble, Berlin, 20.11.2009, I B 3 - 26 50 00/21; Federal Ministry of Economics and Technology; For the Ministry Dr. Bettina Waldmann.

[37] §11(2) of VOB/A. The content of §15(5) of VOL/A is almost identical.

corruption effect remains, as yet, in the realm of wishful thinking.

Viewed in its entirety, the system of public procurement and the anti-corruption measures it undertakes (evidently much more successfully than those adopted in Bulgaria) confirm the impression that the effective fight against corruption in the field is not integrally connected to the level of publicity ensured throughout the process. According to German legislation, the main (and, more or less, only) rule related to transparency in the award process is the lawful publication of the notice (or invitation, respectively) for the tender. Clearly, legal rules aimed to achieve maximum competition in the award serve as a natural corrective to any attempts to engage in corrupt practices. The remaining documentation, including the procurement contract, is not required to be published and promulgated, as long as all rules applicable to the award of the specific type of procurement have been observed.

The different approach adopted by the two countries when setting publicity and transparency obligations in the award of public procurement contracts supports, as has already been commented, the view that an increase in the volume of transparency rules does not necessarily result in a decrease in corruption in the award process. Germany is a perfect example in this respect, given the significantly lower levels of corruption in the country. The specific legislative measures applied by Germany for the prevention of and in the fight against corruption in public procurement are discussed below, along with good practices that could be of advantage to Bulgaria in this field.

3.1. THE INTEGRITY PACT AS TOOL OPTIMIZING TRANSPARENCY AND CURBING CORRUPTION

In the context of ensuring sufficient publicity and transparency in the award process, here is another parallel between Germany and Bulgaria – TI has introduced its instrument against corruption in the sector in both of the countries, namely the Integrity Pact. The results from the introduction of the Integrity Pact in Bulgaria in 2012 were discussed in chapter 4. Germany saw the introduction of a similar Pact in 2004 in connection with a multimillion procurement for the Berlin Schönefeld Airport Project. The

discussion of Bulgarian experience revealed that the model has its positive characteristics, but also too many poorly functioning elements, which, according to the analysis provided in chapter 4, limit the opportunities for its additional monitoring functions to achieve appreciable anti-corruption results. The main criticism was aimed against the encouraging aspect of placing those contracting authorities in the White Book, who have, during procurement procedures, observed Pact rules and made no attempts to distort imperative rules. The absence of significant sanctions is a considerable drawback of the Bulgarian model of the Pact, all the more so because the national 'specifics' of corruption in Bulgaria cannot justify the application solely of the encouraging aspect of the Pact.

The German example in the application of a similar Pact reveals the very opposite policy – 'In case of breach of the Schönefeld Airport Integrity Pact, the liquidated damages clause is set at three per cent of the contract value, up to an amount of EUR 50,000. In addition, the authority is entitled to exclude the bidder from the bidding process (and in case of serious violations, also from future bids). This amount is increased to the equivalent of five per cent of the contract value (without a monetary ceiling) if the contractor violates any of the provisions of the Integrity Pact after the contract award. In this case, the authority may cancel the contract and, in the case of serious violation, may exclude the contractor from future bidding processes.'[38]

Such sanction has a much more motivating and disciplinary effect against attempts to undermine the public procurement with corruption attacks. Hence the German model of the Integrity Pact is much more successful and fits the essence of Bulgarian reality much better. This combination of publicity, constant control by an independent entity at each phase of the award process and strict sanctions could constitute a valid recipe against bribing participants in Bulgarian procedures as well. Of course, the whole concept is for the Pact to be applied sporadically, for isolated procedures, and thus no comprehensive treatment of the problem could be expected, but at least for socially significant projects of

[38] Olaya, J. (2010). *Case study: the implementation of an Integrity Pact in the Berlin Schönefeld Airport Project*. Transparency International.

exceptionally high value such a considerably more restrictive draft of the Integrity Pact would be highly applicable in Bulgaria.

4. CONTRACTING AUTHORITIES UNDER GWB

Possible contracting authorities in the federal structure of Germany under the GWB are:

(i) regional or local authorities as well as their special funds;
(ii) other legal persons under public or private law established for the specific purpose of meeting non-commercial needs in the general interest;
(iii) associations whose members fall under (i) or (ii);
(iv) natural or legal entities under private law which operate in the fields of drinking water, energy supply or transport (*i.e.*, the utilities), having been granted special or exclusive rights by a competent authority;
(v) natural or legal entities awarding works contracts or independent contractor services for works being subsidised by more than 50% by public authorities;
(vi) works concessionaires.

This list of possible contracting authorities fully complies with Directive 2004/18/EC. In particular, the text of §98(1), item 2 GWB, relating to (ii) above, namely the so-called 'bodies governed by public law', does not allow for broad interpretation and expansion of the scope of contracting authorities (which, as was discussed in chapter 3 of the present study, is precisely the case with the definition set out in Bulgarian legislation). In reality, at the level of public procurement entities, fundamental German legislation in the field once again demonstrates a close link to the main EU rules, refraining from superfluous 'creativity' in its legislative decisions. Conservative observance of EU law in the spending of public funds is ensured and players in this part of the market are not needlessly increased. As was noted in chapter 3, despite the lack of any serious motive for increasing public procurement entities, Bulgarian legislation tends to regard this expansion almost as a restrictive measure aimed at stricter control over spending, covering a wider circle of entities,

defined by national legislation as contracting authorities. At the same time, however, this attitude gives rise to considerable corruption ambitions for those entities, which have been branded contracting authorities against their will and have had their freedom to negotiate severely restricted.

In addition to the five categories of contracting authorities listed above, German law, once again in accordance with the Procurement Directives, allows joint procurement by means of collaboration between two or more awarding authorities, although this is quite rare. On the contrary, the use of central purchasing bodies, as provided in Article 11 of Directive 2004/18/EC, is widely practised in Germany. The use of a public purchaser from or through which other contracting authorities acquire works, supplies or services is seen as an anti-corruption weapon as well. This type of centralized award and its advantages are detailed below.

5. PROCEDURES

In accordance with the Procurement Directives, German public procurement law provides for four types of award procedures for tender awards above threshold values: the open procedure; the restricted procedure; the negotiated procedure and the competitive dialogue (except for utilities). However, as a general rule, contracting entities must apply the open procedure unless otherwise allowed by the GWB.[39] They are only permitted to use the restricted procedure or the negotiated procedure and the competitive dialogue under the circumstances outlined in law.[40] An incorrect choice of procurement procedure does not mean that an unsuccessful bidder will win a challenge in every case. 'For example, if the unsuccessful bidder is unreliable so that it is excluded from the procurement procedure in any case, there is no causality between the incorrect procurement procedure and the failure of the bid.'[41]

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[39] See §101(7) of GWB.

[40] By way of exception, an awarding authority subject to the SektVO can choose freely among the four types of procedures if a prior tender notice has been published.

[41] ed. Ellison, J., Baudrihaye, L. (2013) International Comparative Legal Guides to: Public Procurement 2014, ch. 10 - Germany, London: Global Legal Group Ltd p. 70 *et seq*.

Below EU threshold values, German procurement law provides for three types of tender procedures which mirror to the greatest extent the open, the restricted and the negotiated procedure.

In contrast to other European countries, but quite similarly to Bulgaria, there is insufficient experience with award procedures under the competitive dialogue. Public-private partnerships in Germany are usually awarded using the negotiated procedure.

The use of the procedures available under the Directives is almost the same in both countries. However, the prevalence of the open procedure as an explicit rule under German legislation is, by definition, a good anti-corruption practice. This type of procedure ensures, to the greatest extent, that the award will not be influenced by subjectivity and that there will be no substantive changes to the preliminary goals of the respective contracting authority. In Bulgaria the open procedure is also commonly used, but there is no imperative requirement that this procedure be followed. Consequently, negotiated procedures without call for competition, or restricted procedures are used as conduits for corrupt intentions in a number of cases (see chapter 5). With the transposition of the New Procurement Directives which attempt to significantly limit any opportunities for chicanery in the use of the negotiated procedure without prior publication, it would be a good idea to put to public debate the option for Bulgarian legislation to give legal priority to the open procedure, following the example of the German model. This will, on the one hand, increase competition in the sector which will inevitably hinder the implementation of corruption schemes related to the elimination of candidates and participants from the procedures. On the other hand, it is a much more valid approach towards safeguarding the principle of transparency in the award process instead of endlessly inventing new rules which require the accumulation and repetition of the same information on numerous different platforms. A mechanism which requires from contracting authorities to motivate and justify their choice of using any of the lighter award regimes would serve to discipline them and would have a distinct anti-corruption effect. It is, however, possible to view such prioritization of the open procedure as encumbering and impeding and running contrary to the desire for a more efficient and less burdensome award process. Yet, if a balance is reached between a low administrative burden and the absence of additional bureaucratic obligations for

contracting authorities, the preferred use of the open procedure could be 'stomached' and organised in a manner similar to the one adopted in Germany in aid of the fight against corruption.

As demonstrated in previous chapters,[42] the fight against corruption in public procurement in Bulgaria needs to have a clear punitive and restrictive character in order to be effective. Practice has clearly shown that prevention and optional provisions only serve to facilitate the introduction of inoperative mechanisms, such as maintaining data on offending contractors or the encouragement of individual positive practices.[43] Such measures do not bring about satisfactory results but only serve to 'throw dust in the eyes' of control exercised by the EU with regards to corruption levels in the country and public procurement award and implementation.

6. AWARD CRITERIA

Unsurprisingly, under the German public procurement system award criteria are also fully harmonised with the Procurement Directives' requirements, without too many differences. Contracts must be awarded on the basis of the award criteria, which are specified at the beginning of the procedure. Awarding authorities may choose (until the New Procurement Directives become operational) between awarding the contract on the basis of the 'most economically advantageous tender' or on the basis of the 'lowest price' only. A national characteristic is the predominance of the 'most economically advantageous tender'. In accordance with §97 para 5 of GWB '[t]he economically most advantageous tender shall be accepted' as a rule. In the words of Burgi, 'the price is not the only decisive criterion. But without doubt, the price is still the most crucial factor when deciding about the most economically advantageous tender.'[44]

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42 And especially with view of the cultural and historical grounds for corruption in Bulgaria, as investigated in the first chapters.

43 In accordance with the concept of TI for an Integrity Pact in Bulgaria. See chapter 4.

44 See *supra* note 29, p. 6.

Most frequently, contracting authorities use a combination of price and quality criteria to determine the most economically advantageous tender. In fact, sometimes lawyers forget to even mention 'the lowest price' as a possible criterion[45] when describing the German public procurement system. However, such criterion is, of course, permitted, and is used mainly in the utilities sector – there is a number of supply and service contracts where the lowest price is the only award criterion (*e.g.*, waste disposal services and public transport).

Burges Salmon observe that: 'Interestingly, where quality criteria are used to determine the most economically advantageous tender, German judicial rulings call for greater disclosure of the criteria and sub-criteria on which quality will be assessed. It is not clear whether this results in greater weightings being attributed to design.'[46]

The set of criteria in both countries is, once again, in full conformity with EU legislation and does not differ in its substance. However, German legislation contains an express provision which gives priority to the 'most economically advantageous tender'. From an EU perspective this is clearly a good anti-corruption measure, which broadens the scope of the criteria evaluated in the course of the procurement procedure and provides the opportunity for a more complex rating by the contracting authority. This approach was apparently taken into consideration during preparation of the New Procurement Directives, where the 'lowest price' criterion is no longer available, save where the most economically advantageous tender is identified on the basis of price alone.

The situation in Bulgaria is quite the reverse – at the moment the 'most economically advantageous tender' is more often used by contracting authorities than the 'lowest price' criterion, despite the fact that the applicable legislation does not provide an explicit provision in that respect. As was discussed in the previous chapter, this is a negative trend considering that the analysis of the most common infringements and

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[45] *e.g.*, Hantschel, A., Schlange-Schöningen, A. (2010). *Public Contracts in Germany*, [online] Available at: http://www.een-ireland.ie/eei/assets/documents/uploaded/general/Public%20Contracts%20in%20Germany.pdf [Accessed 4.6.2015].

[46] *Comparative Procurement: Procurement regulation and practice in Germany, Sweden and the UK*. (2012). An independent report prepared for the RIBA by contributors from Burges Salmon Law Company, p. 6.

corruption loopholes indicates that the 'most economically advantageous offer' criterion is used specifically for corruption incentives. The more complex and varied the criteria, the better the chance for selecting the 'pre-approved' candidate. That is why this amendment introduced into the New Procurement Directives is not particularly beneficial, given that in Bulgaria the lack of the 'lowest price' criterion could serve to further spread corruption, despite the fact that the amendment intends to achieve the very opposite.

With view of the above, Bulgaria will obviously have to harmonise this model with the German one, in the course of transposition of the common rules applicable to all member-states. The particular situation in Bulgaria, however, and the 'national characteristics' of corruption in the country, do, indeed, preclude a general regard of the elimination/transformation of 'the lowest price' criterion as a uniformly positive practice, which should be adopted with the purpose of fighting corruption. Given, however, that Bulgarian legislation would have no choice in the matter, only future practice and the expected new national legislation will show whether the scepticism expressed herein towards this decision is prudent or not.

7. APPEAL

The possibilities for award procedures to be attacked by unsuccessful bidders are seen as the 'dichotomy' of the German public procurement system by some authors.[47] The review system only applies to contracts above EU thresholds.[48] The GWB provides, in §107, that:

'Every undertaking which has an interest in the contract and

[47] See *supra* note 41.

[48] Because below the threshold values the procurement regulations are internal administrative instructions, they do not grant any rights in favour of the candidates or bidders to ensure compliance with GWB or VOB/A and VOL/A regulations. Below the EU thresholds, the system of protection of the bidders is significantly weaker and the GWB does not apply. Bidders are generally restricted to administrative complaints, where the remedies are limited to compensation for damages (if a legal provision was not complied with in the award procedure and the procurement contract was not awarded to the claimant).

> claims that its rights […] were violated by non-compliance with the provisions governing the awarding of public contracts has the right to file an application. In doing so, it must be shown that the undertaking has suffered a loss, or may be about to suffer a loss, in consequence of the alleged violation of provisions governing the awarding of public contracts.'

There are two levels of review bodies: the public procurement tribunals (*Vergabekammern*), acting at first instance[49] and the award senates at the Courts of Appeal (*Oberlandesgerichte*), at second instance.

Generally, the interested party which is able to demonstrate a violation of rights must, *as a first step,* seek review with the awarding body, *i.e.,* the contracting authority. The objection must be raised 'without undue delay',[50] which in effect means immediately (within a few days). If the objection is rejected by the contracting authority, the bidder has 15 days in which to commence first instance proceedings. As a rule, an appeal before the public procurement tribunal suspends further implementation of the public procurement procedure.

The framework of appeal, as organised in Bulgarian legislation and reviewed in chapter 3, does not, in reality, provide individual time or opportunity for contracting authorities to react to the appeal. The appeal is, instead, sent directly to the first instance. (*i.e.*, CPC) and, within the time limit designated for review of the appeal and delivery of the decision of the CPC, the contracting authority may react and correct certain errors, omissions and other defects of the procurement, where such are deemed to exist.[51] German legislation, on the other hand, allows contracting authorities much wider opportunities to react independently thus avoiding unnecessary squandering of the resources of the appellate authority, and allowing the contracting authority to take individual responsibility for the public procurement at hand. In particular, where corruption is established,

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[49] The awards chamber of the Federal Government at the Federal Cartel Office reviews public contracts awarded by the Federal Government, while the awards chambers of the separate *Bundesländer* have jurisdiction over the contracts attributable to the individual states.

[50] §107(3) of GWB (the so called '*unverzügliche Rüge*').

[51] PPA, Art. 121(8) - 'Acting on its own initiative, the contracting authority may eliminate the violation before pronouncement by the Commission on Protection of Competition'.

the contracting authority may well react in good time and not within the period of the official appeal which contributes to faster smoothing out of any imperfections of the award (if, of course, this is possible, which may also depend on the phase of the procedure). This option, provided to the contracting authority, in combination with the suspensive effect of the appeal, discussed below, (at both first and second instance)[52] has a relatively stronger disciplining effect on the contracting authority and on other participants in the procedure and could constitute a useful approach to the appeal of procurement procedures in Bulgaria.

The automatic suspensive effect of the application for an award review, in the form of a prohibition of the award, is an essential part of the remedies procedure under German law. 'If the public procurement tribunal informs the contracting entity in writing about the application for review, the latter must not make the award prior to the decision of the public procurement tribunal and before the expiry of the period for a complaint.'[53] An award in violation of this prohibition will be considered null and void.

This legislative solution, adopted in Germany, varies widely from the Bulgarian situation, where, despite the numerous discussions and amendments to the PPA, there is no automatic suspensive effect, with the exception of appeals against the decision of the contracting authority announcing the selected contractor. This approach results in the conclusion of contracts despite concerns about infringements (unless the court, at its own discretion, grants the request of the appellant for suspension of the procedure for the period of the appeal) and strongly discourages bidders to attempt to protect their rights before the respective control and appellate authority. Consequently, the absence of a suspensive effect also affects cases of procurement awards involving well-implemented corruption – the remaining bidders see no point in appealing against acts or omissions of contracting authorities because costs will inevitably be incurred during the appeal proceedings, and the entire process will stretch out for an indefinite period of time before any compensation could be obtained, provided that the complaint is upheld. Thus a significant portion of unlawful spending of

[52] §115 of GWB.

[53] §115(1) of GWB.

public funds is not even challenged. Automatic suspensive effect is a very positive practice, especially as the GWB provides sufficient guarantees that suspension of the procedure and delays in procurement implementation will not have a negative effect on the social and economic relations sought to be resolved.[54]

Currently, under the PPA only appeals against the final decision of the contracting authority have an automatic suspensive effect. The adopted model allows the decision selecting the contractor to enter into force only after all preceding decisions of the contracting authority have entered into force and have not been appealed, or, where appealed, the dispute has been resolved. Hence the appeal against the decision selecting the contractor suspends the procedure at the phase of contract conclusion. In all other cases appeals against acts and omissions of the contracting authority do not have an automatic suspensive effect (although suspension of the procedure could be requested and possibly approved by the first instance of appeal). The Bulgarian contracting authority hence is able to protect its rights with regard to an appeal against the procedure within the time period of first instance proceedings, and to proceed with the procurement itself which could actually be finalized and the contract concluded while an appeal against the notification for the very same procurement is still under review. This is most certainly imprudent. A much better organised anti-corruption policy would require the adoption of a model similar to the German one, where the appeal may suspend the procedure at any phase and the contracting authority is first given the individual opportunity, within a short period of time, to react to the considerations of the appellant and to rectify or to decline to rectify any shortcomings.

This difference in the two approaches to the option for direct contact with the contracting authority and the lodging of objections against its

[54] For example, §115(1) of GWB states that: 'The public procurement tribunal may allow the contracting entity […] to award the contract after the expiry of two weeks after the announcement of this decision if, taking into account all interests which may be impaired as well as the interests of the general public in the quick conclusion of the award procedure, the negative consequences of delaying the award until the end of the review outweigh the advantages involved. In its assessment, the public procurement tribunal shall take account of the interests of the general public that the contracting entity carries out its tasks efficiently. The public procurement tribunal shall also consider the overall prospects of the applicant to win the award in the award procedure. The prospects of success of the application for review need not be taken into account in every case'.

actions and decisions prior to referring the issue to the appellate body, as well as the different scope of the suspensive effect in the two systems arises from the option opened by Directive 66/2007/EC, which provides that 'Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.'[55] The Bulgarian legislator has chosen not to avail itself of this additional opportunity, which, as has already been commented, could have a considerable anti-corruption and instructive effect on all participants in award procedures.

In Germany it is only after the objection has been lodged with the contracting authority that the legal facility for the *actual appeal before the first instance* – the public procurement tribunals[56] is created. Each public procurement tribunal is competent to issue an order to stop the procedure (as is the common case, as discussed above), to alter the status of the proceedings, to revise the decisions taken, or, in some exceptional cases, even to intervene in the procedure[57] (if the procedure is not suspended).[58]

Once an award has been made and the procurement contract has been signed, such award cannot be cancelled.[59] The parties concerned may seek compensation by claiming damages against the contracting authority. This is yet another feature of German legislation regulating the appeals in the field of procurement which has a considerable disciplining effect. It assists interested parties seeking to protect their rights at the first possible moment, and, indeed, on the smallest suspicion of corrupt interference in the choice of the contracting authority. This also stimulates internal control over the award process exercised by the contracting authority itself, which would, in this case, consciously strive to avoid infringements to the procedure, because any appeals against its acts and actions would suspend

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55 The Remedies Directive, Art. 1(5).

56 GWB, §107(3), it. 4.

57 GWB, §115(3).

58 See also *Report concerning the Study on Pre-Contract Problem-Solving Systems*. (2002). Copenhagen: The Danish Competition Authority.

59 GWB, §104(2).

the procedure. Moreover, where a contract has been concluded by means of a corrupt procedure, then the parties concerned would seek compensation. Bulgarian legislation, of course, also provides the option of claims for damages under general civil law.[60] This option is used, albeit increasingly rarely, and, as has already been analysed in the broader sense, the multitude of procedural rules and the absence of guarantees for a lawful conclusion to appeal proceedings often discourage interested parties from attempting to protect their rights at a later stage.

Last but not least, there is another disciplining measure which the GWB has created concerning appeals (once again on the basis of the general rules set out by Directive 66/2007/EC) and which has an anti-corruption effect as well. In several strictly defined cases (and as an exception to the rule that a contract, once concluded, cannot be annulled) the public procurement tribunal has the competence to declare the contract to be ineffective *ab initio* (*Umwirksamkeit von Anfang an*).[61] Where the contracting authority has failed to inform rejected bidders before conclusion of a contract or has awarded the contract without including other candidates in the procedure and assuring the minimum level of competition, the contract may be deemed by the tribunal to be ineffective.[62] 'Thus, it can be concluded that an independent legal procedure has been established for primary legal protection in contract award matters.'[63]

Naturally, following transposition of the Remedies Directive, the Bulgarian PPA also adopted a similar measure but with several quite significant differences from the German model which render the legal arrangement 'weaker' and the anti-corruption effect much smaller. Caranta

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[60] Pursuant to the Obligations and Contracts Act, promulgated SG 2/5.12.1950, as amended, and the Commercial Act, promulgated SG 48/18.6.1991; effective as of 1.7.1991, as amended.

[61] §101b of GWB.

[62] German law differentiates between ineffectiveness and annulment. The difference is mainly that ineffectiveness provides the option for remedying of the defect and is also applicable from a certain point in time onwards. There are also the terms of ineffectiveness 'ex tunk' or '*ab initio*', which, in practice, coincides with the general concept of 'annulment' – there is no option for remedies and effect is retroactive.

Quite separately from the above, ineffectiveness can be regarded as one of the possible remedies set out in the Remedies Directive, Art. 2d which has been transposed into GWB.

[63] See *supra* note 41.

has observed that:

> 'The Directive allows Member States to choose whether the ineffectiveness operates retroactively or for the future only, and this both accommodates potential different approaches […]. Unsurprisingly given the novelty of the remedy, a number of Member States rather preferred to limit ineffectiveness to the proactive effects, even if this impacts the effectiveness of the remedy (the so called 'ineffectiveness light'). […]. In other jurisdictions, however, ineffectiveness operates retroactively. This is the case for instance in France, Romania and in Germany.'[64]

Bulgaria, respectively, has chosen the lighter option by determining, in such cases, concluded contracts to be ineffective.[65] Ineffectiveness under Bulgarian legislation can result in contract nullity but can also be expressed in its voidability, i.e. a loophole has been left for remedying of contractual relations. This means that within the PPA the legislator has provided the option for contracts concluded without conduct of a public procurement procedure and in complete disregard of competition rules, as well as contracts, concluded on the basis of unlawful application of the negotiated procedure without publication (again, to the disadvantage of competition in the sector) to not be declared void. In fact, contracts with such severe defects with regards to PPA observance[66] may continue to have effect between the parties. This is definitely to the detriment of anti-corruption efforts in Bulgaria, where the issue of corruption is much more serious and poorly resolved than in Germany, which has adopted the more restrictive model proposed by Directive 66/2007/EC.

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[64] Caranta, R. (2011). *The Comparatist's Lens on Remedies in Public Procurement*, Working Papers Series European and Comparative Law Issues, Istituto Universitario di Studi Europei 2011-1/2-ECLI, p. 9.

[65] PPA, Art. 41b(1): 'The following contracts or framework agreements shall be ineffective in respect of the persons covered under Art. 122i, para 1, where concluded: 1. Without a public procurement award procedure despite the existence of grounds for conduct of such procedure; 2. Upon legally non-conforming application of the grounds of Art. 4, Art. 12(1), Art. 90(1), Art. 103(2) or Art. 119c(3).' The provisions listed cover cases where the contracts concluded fall beyond the scope of the Act; unlawful conduct of negotiated procedure without prior notification *etc*.

[66] Discussed in chapter 5 as a frequent form of corruption aiming the selection of the desirable candidate and elimination of the other participants in the procedure.

Following an appeal to the public procurement tribunal, the decision may be challenged before the German Court of Appeal, acting at *second instance*. The Court of Appeal will issue the order it feels appropriate. Several hundred award review procedures are conducted each year under the GWB regime. Detailed statistics on the number of applications for an ineffectiveness order are, unfortunately, not available.[67]

Appeal at the second instance once again has suspensive effect, this time with respect to the decision of the first instance body.[68] The decision at first instance may be appealed by the contracting authority as well, and, in this aspect the German legislator has provided another positive imperative measure which would most definitely have a 'sobering' effect on the Bulgarian legislator, too, causing it to succumb less readily to corruption if a similar provision were to be included in the PPA. This ensures immediacy of application of the court decision: 'If an application of the contracting authority [...] is rejected by the appellate court, the award procedure shall be deemed to have ended upon the expiry of 10 days after service of the decision unless the contracting authority takes the measure to restore the lawfulness of the procedure, which follows from the decision; the procedure must not be continued.'[69]

8. CORRUPTION IN PUBLIC PROCUREMENT AND THE GERMAN WAY TO COMBAT IT

Germany is not a country untouched by this phenomenon and it continues its intense fight against all manifestations of corruption at administrative and internal levels. So far the comparative analysis carried out in the present chapter discusses individual examples of German policy against corruption in the field of public spending and separate provisions which, although with a different main function, have a disciplining and

[67] More general statistics indicate that around 17% of the applications before the public procurement tribunals were successful.

[68] According to §118 of GWB 'The suspensive effect shall lapse two weeks after the expiry of the time limit for the complaint'.

[69] §122 of GWB.

'stress' effect on participants in the procedures.

In the next part the analysis of German legislation and anti-corruption policies in the field will be much more systematized, and the comparison to the Bulgarian model will contribute for a clear outlining of the main parameters on which Germany depends to tackle corruption and distortion of competition in public award.

8.1. CORRUPTION PREVENTION LEGISLATION

Germany is signatory to the OECD Anti-Bribery Convention,[70] the United Nations Convention Against Corruption (UNCAC),[71] and the Council of Europe's Civil and Criminal Law Conventions against Corruption.[72] In addition, Germany is also a member of the Group of States Against Corruption (GRECO). However, Germany has not yet ratified the United Nations' Convention nor the Council of Europe's civil and criminal law conventions,[73] and has been repeatedly criticised over the past decade by multiple international organisations for being 'a notorious laggard on implementing adequate anti-corruption measures.'[74]

Various German legislative acts deal with corruption offences: the main act is the German Criminal Code (*Strafgesetzbuch* - StGB).[75] It criminalises the giving and receiving of bribes in the public (§331-338) and private (§299-302) sectors. The main texts regulating corruption in

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[70] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.* (1997). Adopted by the Negotiating Conference, OECD.

[71] *United Nations Convention Against Corruption*, 13.10.2003, 2349 UNTS 41. United Nations Office on Drugs and Crime, New York.

[72] *Civil Law Convention on Corruption*, 4.11.1999, CETS 174, Strasbourg and *Criminal Law Convention on Corruption*, 27.1.1999, CETS 173, Strasbourg.

[73] *i.e.*, *The Council of Europe Civil Law Convention on Corruption* (signed by Germany 1999), *The Council of Europe Criminal Law Convention on Corruption* (signed by Germany 1999), *The Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe* (CETS 191, signed by Germany 2003).

[74] Pulito, A. (2012). *Germany the anti-corruption laggar*, Academia.edu, (2012). [online] Available at: https://www.academia.edu/2225981/Germany_the_anti-corruption_laggard [Accessed 4.6.2015], p. 1.

[75] Promulgated Federal Gazette I, p. 945, p. 3322/13.11.1998, as amended.

public bids and in public administration (one of the types of corruption with a high percentage of incidence – around 35% over the last few years)[76] are §298 and 331 *et seq*. StGB. §298 regulates criminal liability for restricting competition through agreements in the context of public bids, and targets bidders who present an offer based on an unlawful agreement so as to influence the decision of the contracting authority. §331 *et seq*. StGB regulate criminal liability for bribery in the public sector, where both the taking and giving of bribes are criminal offences.[77] Particularly serious cases of bribery of a public official can be punished by imprisonment for up to ten years. In addition, the suppression of corruption at international level is dealt with by the International Bribery Act (*Gesetz zur Bekämpfung Internationaler Bestechung*)[78] and the EU Bribery Act (*EU-Bestechungsgesetz*).[79] There are also mandatory guidelines and regulations relating to the prevention of corruption in the public sector.[80]

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[76] Information taken from the official statistics of the German Federal Police Office (*Bundescriminalamt*); Bka.de, (2015). *BKA Startseite*. [online] Available at: http://www.bka.de/DE/Home/homepage__node.html?__nnn=true [Accessed 4.6.2015].

[77] *e.g.*, Taking bribes (§331 of StGB): 'It is a criminal offence if a public official demands, allows himself to be promised or accepts a personal benefit for himself or on behalf of a third party for the discharge of an official duty. 'Benefit' would be any advantage to which the public official is not legally entitled and is not necessarily pecuniary in nature'.

Taking bribes intended to encourage violation of official duties (§332 of StGB): 'It is the aggravated form of the offence in section 331 and requires the performance of an official act that violates an official duty'.

Giving bribes (§333 and §334 of StGB): 'Under §333 and §334 of StGB, promising and giving bribes to public officials is a criminal offence. §334 additionally requires the performance of an official act that violates an official duty'.

[78] Promulgated Federal Gazette II 2327 / 1998, as amended.

[79] Promulgated Federal Gazette II, p. 2340; III, p. 188-88 / 10.9.1998, as amended.

[80] *e.g.*, *Guidelines of the Federal Government on the Prevention of Corruption within the Federal Administration* (*Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung*) Bmi.bund.de, (2004). [online] Available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Korruption_Sponsoring/Richtlinie_zur_Korruptionspraevention_in_der_Bundesverwaltung.html [Accessed 4 Jun. 2015].

8.2. ANTI-CORRUPTION STRATEGIES AND INSTITUTIONS

Funk has noted that a report by OECD Working Group on Bribery in March 2011 characterized Germany as having assumed a 'leading position' in the investigation and prosecution of foreign bribery cases. 'Germany's enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals.'[81] This, as will be explained in detail below, is precisely one of the keys to success in the fight against corruption which should most certainly be adopted by all countries. *Per argumentum a fortiori* this applies with full force to countries such as Bulgaria, which not only have a serious problem with corruption at all levels of government, but whose specific national cultural and historical characteristics reveal an acute need for the adoption of effective, strict and 'condemning' measures against offenders.

Further, according to the Business Anti-Corruption Portal, German corruption strategies are commonly based on the Concept of Corruption Prevention and Combating adopted by the Standing Conference of Federal State Ministers and Senators of the Interior's (IMK) in 1995. This nationwide anti-corruption strategy outlines key concepts and goals in German corruption prevention, and its implementation is monitored through periodic reports to the IMK, submitted by supervisory bodies in federal states' administrative departments.[82]

The prosecution authority responsible for investigating corporate or business fraud is the competent Public Prosecutor's Office (*Staatsanwaltschaft*).[83] Further, in Germany, the function of the courts of

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[81] Funk, T.M. (2014). Germany's Foreign Anti-Corruption Efforts – Second-Tier No More. *ZDAR,* issue 1/2014, p. 24. Funk also cites the OECD Working Group on Bribery.

[82] Business-anti-corruption.com. (2015) Available at: http://www.business-anti-corruption.com/country-profiles/europe-central-asia/germany/initiatives/public-anti-corruption-initiatives.aspx [Accessed 4.6.2015].

[83] On the federal level the Federal Criminal Agency (*Bundeskriminalamt*) and the relevant municipal authorities are also fundamental in monitoring and combating corruption at each institutional level.

auditors as controlling organs is well developed and very strong.[84] Financial audit is divided between the State Courts of Auditors, which examine the financial management of the states, and the Federal Court of Auditors (*Bundesrechnungshof*), which examines financial management at federal level. Both institutions have budgetary autonomy meaning that each individual State Court of Auditors adopts and implements its own budget and has its own external audit institution.[85]

This structure of *ex ante* efficiency control over spent public funds is exactly the reverse of what is observed in Bulgaria (as shown in chapter 3 of this study). As has been commented, the NAO in Bulgaria is the only comparatively independent institution (or at least is meant to be such) that should, in practice, play a key role in the control of public procurement and serve as the main disciplinary non-judicial body, implementing violation prevention, including the prevention of corrupt activities of all kinds, in award procedures. The conclusions reached in chapter 3, namely that the role and functions of the NAO as a control body need to be speedily enhanced (as opposed to what has been happening in reality over the last few years) are confirmed in practice by the German model. Germany has a well-developed and active system of Courts of Auditors, which are independent institutions with an anti-corruption impact. Due to its district division, this system is also divided into several levels but performs, nevertheless, the same functions within the separate regions. Germany' model, thus, is quite dissimilar to the Bulgarian one with its two different financial control bodies (PFIA and NAO), which, albeit organised in a different manner, in essence have overlapping activities.

The Federal Court of Auditors is a complex body comprising nine audit divisions and 52 units. Each audit division is headed by a senior

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[84] As evaluated by the Global Integrity 2011 and Transparency International in the National Integrity System Assessment 2012. The human and financial resources of this institution are found to be appropriate for their duties and governance is assessed as being excellent.

[85] The structure of the Federal Court of Auditors, the appointment of its members and the procedures required for a decision to be reached are regulated by the Federal Audit Office Act (*Bundesrechnungshofgesetz*, Federal Gazette I, p. 160/5.2.2009, as amended) and supplementary provisions. The audit functions, objects, criteria and procedures are outlined in the Federal Budget Code (*Bundeshaushaltsordnung*, BGBl. I S. 1284 / 19.8.1969, as amended, BHO), the Budgeting Principles Act (*Haushaltsgrundsätzegesetz*, BGBl. I S. 1273/19.8.1969, as amended) and other specialized acts.

audit director and consists of several audit units and steering units. Audit decisions are adopted by panels made up of the senior audit director and audit directors. Panels of three members may also be formed in certain cases. If the three-member panel fails to reach agreement on a particular point, the issue is referred to the Senate, which is the supreme decision-making body of the Court of Auditors. This complex system of units is organised precisely so that these bodies may reach objective and independent decisions, in the event of opposing opinions between panels or divisions.

The Federal Court of Auditors carries out annual audits on the activities and financial management of the entire German administrative apparatus and, additionally, has the competence to carry out examinations of bodies or other third parties outside the federal administration where these receive or handle federal funds.

Another fundamental and substantial difference between the main auditing bodies of Germany and Bulgaria can be found in the much wider rights enjoyed by the Federal Court of Auditors, which, in many cases, is not content to only establish and report infringements.[86] It may also issue instructions on how contracting authorities are to act and, in practice, intervenes in the organisation of the award process. It also schedules a follow-up on how its recommendations have been applied at a later stage (the following audit year). According to the annual report of the Federal Court of Auditors, for example:[87]

> 'We found that the division [of the Foreign Office providers] in charge of procurement and contract awards frequently purchased items inefficiently and non-competitively by ordering them from particular manufacturers or suppliers with which it maintained long-standing business relationships. […] Budgetary and procurement law require that contracting authorities procure goods and services efficiently under a

[86] The Bulgarian NAO has sanctioning functions as well which, in recent years, are constantly removed and restored as part of its competence (see chapter 4).

[87] *Annual Report on Federal Financial Management 2013* (Abridged English Version) [online] Available at: https://www.bundesrechnungshof.de/en/veroeffentlichungen/bemerkungen-jahresberichte-en/dateien/2013-annual-report [Accessed 3.7.2015], p. 29.

> formal procurement procedure, having special regard to open competition. The awarding of public contracts is particularly vulnerable to corruption. The Federal Government's Guidelines on Corruption Prevention call for preventive measures. One of them is to separate the awarding process from procurement planning functions and the specifications of the goods and services to be procured. […] We demanded that the Federal Foreign Office reorganise the procurement of furnishings and office equipment for its foreign missions, comply henceforth with budgetary and procurement law and take steps to mitigate risks of corruption. Furthermore, we suggested that suitable standardised products be procured more frequently either by means of blanket agreements or by having the needed items purchased locally by the respective foreign mission in order to achieve better bargains and save transport costs.'

In addition, the Federal Court of Auditors focuses much more on efficiency control than is the case with NAO. Anti-corruption policies have a much stronger presence during audits and thus the functions of the main auditing body are much more meaningful than those of a purely verifying body, as is the case of NAO.

Unfortunately, as was noted in the previous chapters, in recent years NAO has become the object of far too many and far too conflicting political games, which have crumpled its image and broken its anti-corruption powers presumably inherent to such an 'independent' auditing body. German practice definitely provides a positive example of the image which the NAO should strive to achieve, if the expectations are for this body to fight corruption in public contracts and provide guidance as to efficiency. Bearing in mind, however, that the initial legal framework regulating the NAO, was established with the active participation of experts from the German Federal Court of Auditors, following which the act was repealed and rewritten several times, all hopes for reintroduction of Germany's good practices obviously remain entirely in the hands of the political class.

9. SUCCESSFUL PILLARS TO STAND UP AGAINST CORRUPTION IN THE AWARD OF PUBLIC CONTRACTS

As noted above, when a public tender criterion is the 'most economically advantageous offer', German law requires an increased level of transparency and disclosure. However, the transparency principle, although of great importance for the conduct of legal and enforceable procurement procedures, is not focused on combating bribery. The strategy of the German public procurement system is aimed at limiting any attempts at abuse of power. The analysis of this study shows that the German procurement process rests on three main successful pillars combating corruption attempts in the sector: *first*, adequate legislative decisions, providing clear and unambiguous rules; *secondly*, state-of-the-art procedures, including e-procurement, and whistleblowing systems which are in the process of development, and, *thirdly*, centralized awards (*i.e.*, separation between requiring and awarding entities).

9.1. ADEQUATE LEGISLATIVE DECISIONS PROVIDING CLEAR AND UNAMBIGUOUS RULES

Several specific German public procurement regulations have already been noted above; these have an impact on curbing corruption, particularly the preference for the open procedure as the most transparent and rigorous type, and for the 'most economically advantageous tender'. Some other rules and/or restrictions will be discussed below, which are based on the Procurement Directives but are also expanded, where applicable, and explicitly constructed (or contain important elements) to combat bribery and fraud in the awarding of procurements:

Under German public procurement law there are serious requirements as to the *suitability of bidders*. In conformity with the Procurement Directives, candidates must demonstrate their expertise, economic and technical capacity and their reliability by submitting proof and declarations, as requested by the contracting authorities in the tender notice. Two-stage award procedures, such as the restricted procedures, contain a prequalification stage, where competitors allowed to submit bids

are selected on the basis of best economic and financial standing and technical or professional expertise. After having submitted their bids, bidders are shortlisted and assessed on the basis of the award criteria. The primary means of the Procurement Directives to deal with corrupt candidates, namely their exclusion, is, of course, also part of the legal framework of Germany.[88]

At the prequalification stage Germany has traditions in preliminary 'filtering' of suitable from unsuitable candidates, which results in significant reduction in the workload of the bureaucratic machine at the candidate assessment and ranking stage. Prequalification means verification of bidder suitability within a public procedure which precedes the award procedure and is independent of the procurement, in accordance with the definitive requirements introduced in 2006 under §8 of VOB/A. The second paragraph of §8(3) of VOB/A states that: 'As proof of suitability (expert knowledge, capacity for work and reliability) registration on a publicly available list of the association for requalification of construction undertakings (requalification list) is also admissible and may be requested directly by the contracting entity. Additional evidence relevant to the specific procurement may also be required.'

Germany has even developed a system of voluntary prequalification comprising designated bureaus that carry out prequalification and registration of applicant undertakings into the relevant register. In essence, Germany makes proper use of the opportunities offered by Article 52(1) of Directive 2004/18/EC, which permits Member States, when assessing the suitability of candidates, to make use of official lists with view of introducing certification by certification bodies established in public or private law. This opportunity serves to significantly facilitate life for Member States and to ensure unification with regards to certificates. There is criticism in Germany as to how effective this procedure is, and whether or not it is overly expensive.[89] Ultimately, however, opinions are almost

[88] *e.g.*, VOL/A, Art. 6EC(4) it. (e).

[89] In this sense see also Sesterhenn, C. (2009). *Erfolg durch Präqualifikation in Deutschland und Europa?* in Seminar documents for 11 interdisciplinary conference of Construction Economics and Building Law in Hanover

entirely unanimous that the implementation of the public procurement regime following previous implementation of the complex procedure of assessing candidate capacity is tremendously facilitated and allows contracting authorities to concentrate on evaluating the procurement award criteria.[90] What is more, the New Procurement Directives also support the German model, by focusing on lightening of the award procedures, with the phase dedicated to assessment of tenderers' suitability being significantly facilitated by the implementation of e-Certis, as well by providing the option of shifting responsibility for verification of suitability to the respective participant or candidate, who can submit a self-declaration as valid proof of suitability for participation in a specific procedure by using the European Single Procurement Document.

The option for preliminary registration of suitable candidates into a separate list (applied in Germany mainly in the field of construction works) is particularly interesting for the comparative aspect of this study, due to the fact that its adoption was proposed by the CPCCOC in Bulgaria as part of their comprehensive project for tackling corruption in the field of public procurement (discussed as part of chapter 4 of this work). This proposal received predominantly positive reactions at the CPCCOC expert sessions held in 2013[91] with the main criticism being that the process of legislative changes and training of staff for the purpose – registration of candidates into different lists reflecting their suitability for participation in public procurement award procedures and keeping those lists up to date - would be far too long. This process would, naturally, be a financial burden to the Bulgarian state.

Considering the anti-corruption effect of such preliminary pre-registration, however, it is obvious that the proposal to follow the German model should not be discarded. Bulgaria is facing, in addition to the issues arising from the implementation of the New Procurement Directives by April 2016, a pressing need for a complete overhaul in the legislation regulating public procurement. Bulgaria could profitably make use of the

(*Seminarunterlagen zur 11 Interdisziplinären Tagung für Baubetriebswirtschaft und Baurecht, Hannover*), [online] Available at: http://www.semina.de/verlag/pdf/11_praequalifikation.pdf [Accessed 4 Jun. 2015], p. 72.

90 *Ibid.*

91 In which the author of the present research also took part.

German model of pre-qualification.[92] The analysis of the most frequent offences and corruption schemes made in this work reveals that despite explicit prohibitions, candidate selection criteria and candidate assessment criteria are often wrongfully mixed up and used precisely for the selection of a previously agreed bidder. By transferring the evaluation of selection criteria into a separate stage, perhaps even to be performed by a separate entity independent of the contracting authority, this error would be completely precluded. Contracting authorities would be free to select only from among suitable bidders, and their evaluation will comprise only the selection of the 'most economically advantageous tender.[93]

In connection with the foregoing, and in view of the expected transposition of the New Procurement Directives, the mechanism of 'self-cleaning'[94] is also borrowed from German law,[95] which is connected to the suitability of the bidder, but also provides for a good anti-corruption measure. The idea is that besides following the basic rule that public procurement law provides for exclusion of unreliable tenderers, the reverse option is created, *i.e.* for tenderers to takes effective measures to ensure that omissions will not recur in the future and to provide sufficient proof that will allow them to regain reliability and not to be excluded (based on contracting authorities' discretion). Participants are highly motivated to restore their reputation and so their actions are fundamentally incompatible with subsequent acts of corruption. This mechanism was heavily criticized and widely discussed in connection with its inclusion in the New Procurement Directives. In countries like Germany and Austria, it has proven its anti-corruption effect, transferring responsibility to the candidates in procurement procedures and disciplining them to seek 'to clear their name' alone so as to be able to participate in further procedures. It is uncertain, however, whether this mechanism would have similar effects in all Member States. With respect to Bulgaria, where the very existence of discretion on the part of the contracting authority opens

92 The next chapter will review the Austrian model which is not mandatory but also achieves positive results.

93 Taking into account that following introduction of the New Procurement Directives, the 'lowest price' criterion will be almost entirely eliminated.

94 As envisaged in Directive 24/2014/EU, Art. 57(6).

95 VOB/A, §6a(1), it. 3, VOL/A, §6EC(5), VOF, §4(8), SektVO §21(2).

corruption loopholes, this is rather doubtful. 'Besides, when the assessment of 'self-cleaning' is made by the contracting authorities, there is also a risk that similar situations will be treated differently.'[96] Additional comments on this are included in the next chapter.

Further, the *financial consistency* of the candidate is of particular importance for the German model. Moreover the candidate must have an honest record and not have participated in corrupt practices. As far as public procurement goes, the applicable budget legislation has to be observed,[97] so there must be sufficient funds available for contract performance. This financial aspect has to be approved even prior to the award on the basis of the successful bid, and may lead to the cancellation of the award if the funds are not to hand. However, it is important to note that 'budget laws are only binding on the public administration but do not provide enforceable rights for the bidders.'[98] A tender should not be considered by the awarding entity and must even be excluded where the tenderer has participated in corrupt practices, bribery practices or fraud in Germany or abroad (which is fully consistent with the requirements of the Procurement Directives). Furthermore, pursuant to the VOL/A and the VOB/A, companies can be excluded on the grounds of 'gross misconduct' at the discretion of the contracting authority.

The principle of equal treatment[99] must, naturally, be complied with at all times. Once a candidate is considered suitable, the candidate is no longer to be tested in additional procedures, unless indications justifying such a step arise at a later point.

Both Germany and Bulgaria have adopted provisions which prohibit the participation of candidates which have been a party to corruption,

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96 *Minutes of the Meeting of the Commission Stakeholder Expert Group on Public Procurement*. (2013). EU Commission, Internal Market and Services DG, Public Procurement Policy; proposition of Marco Tanferma, p. 6.

97 *i.e.*, The BHO and the separate regional budget laws.

98 See *supra* note 41.

99 The principle of equal treatment could imply an obligation for transparency as well, following Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: (1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, (2) Östü-Stettin Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH.* [2002] ECR I-11655.

bribery and other similar offences.[100] The weight and application of these provisions, however, differ significantly.

In Germany, this legislative rule constitutes a significant obstacle and 'threat' to participants, because corruption proceedings are initiated speedily, and resolved just as quickly, and, as a final result, the court decision finding corruption may ruin the business and reputation of the potential participant.

In Bulgaria, the number of court proceedings that have actually been initiated, and especially those who have resulted in an enforceable sentence, can be counted on the fingers of one hand. Consequently, the existing provision in the PPA is more or less a dead-letter in its essence and has neither practical impact nor preventive effect.

The by now often-stated conclusion that a significant portion of Bulgarian provisions in the field of public procurement (even those borrowed directly from the Procurement Directives) fail to provide the required legislative and practical effects due to the existence of secondary unfavourable factors is perfectly valid in this instance as well. If there were speedy legal proceedings and a significantly higher rate of detection and sanctioning of corruption schemes, and also the relevant political will, the preventive function and significance of these rules could be improved substantially. In this case the comparison with good practices once again shows that the amassing of a theoretical reserve of legal rules, albeit borrowed from countries with proven experience in the field of combating corruption, as an end in itself, is not, and cannot be the only antidote in Bulgaria.

The aggregation and anti-avoidance rules in the Procurement Directives explicitly prohibit the avoidance of awards by using multiple contracts below the threshold; they have given rise to infringement proceedings against Germany. In *Commission v. Germany*[101] the Court of

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[100] PPA, Art. 47: 'The contracting authority shall exclude from participation in a public procurement award procedure any candidate or tenderer who or which: 1. has been convicted by an enforceable sentence, unless rehabilitated, of: […]; (b) bribery under Art. 301 to 307 of the Criminal Code'.

[101] Judgment of 15 March 2012 in Case C-574/10 *Commission v Germany* [2012], ECLI:EU:C:2012:145, 15.3.2012: In 2006 and 2007, the municipality of Niedernhausen appointed a local engineering company to renovate a hall. The renovation was to be conducted in phases. The German authorities considered that the planning services for each

Justice found that Germany had breached public procurement rules by artificially splitting a contract for planning services, which meant the financial thresholds for the application of the regulations were not triggered. Contracts whose value falls below the thresholds are not subject to the full procurement rules although the Treaty principles, such as transparency and equal treatment, and the TFEU's free movement provisions always apply. Such prohibited splitting, in addition to circumventing award rules, also tends to open up corruption possibilities for the unchecked selection of the 'bribing candidate' (as discussed in chapter 5). The analysis of *Commission v. Germany* exemplifies, however, not only the Court's view on the splitting of contracts and the correct interpretation of the Procurement Directive's rules; it also demonstrates one of the few cases of such kind of procurement infringement in Germany, which was not even intended to promote corrupt behaviour.

Precisely for this reason the parallel between the practices of the two countries with regards to this type of infringement is of particular interest. Splitting is a quite prevalent practice in Bulgaria; it is one of the easier types of infringement to detect. The contracting authority may become confused as to the nature of the required activities and may consequently divide them into several contracts. Only *ex post* control can establish whether the actual characteristics and value of the contracts are such as to require their consolidation into a single procedure and the application of

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phase constituted a separate services contract, the value of each contract falling below the financial thresholds. The ECJ alleged that Germany had artificially divided the contract in breach of public procurement rules: 'An almost arbitrary division of the contracts is contrary to the effectiveness of the directive. It would indeed often lead to values artificially falling below the threshold and thereby to a reduction of its scope of application. The Court notes in its settled case-law the significance of the directive on the award of public contracts for the free movement of services and for fair competition at European Union level. An arbitrary and subjective 'dismemberment' of uniform service contracts would undermine that objective. Budgetary reasons for the division into construction sections could also not justify an artificial division of a unified contract value. It is contrary to the objective of the European public procurement directives for a unified proposed purchase which is carried out in several stages purely for budgetary reasons to be considered solely for that reason to consist of several independent contracts and thereby to be prevented from coming within the scope of application of the directive. Art. 9(3) of the directive indeed forbids such an artificial division of a unified proposed purchase. It must be concluded that the contracts in question constitute a unified proposed purchase, the value of which at the time of the contract award exceeded the threshold laid down in the directive. The contract should therefore have been the subject of a Europe-wide invitation to tender and awarded according to the procedure provided for in the directive. That is not the case and therefore the defendant infringed Directive 2004/18/EC.'

the stricter rules on procurement awards. Although Germany, a Member State of longer standing than Bulgaria, has its share of experience with infringements involving splitting of procurements, in most cases the problem was rather that of purely formal violation of public procurement rules and restriction of competition and not necessarily corruption.

Quite the opposite, in the case of Bulgaria, splitting is used, in the majority of cases, precisely for the purpose of circumventing the law and selecting a favoured candidate. Hence in the Bulgarian case splitting has far more serious repercussions and opens the floodgates for bribery and violations from individuals in an official position: clear corrupt practices. In Germany the same infringement poses a much smaller public threat and occurs far less frequently. Of course, the argument that Germany having been sanctioned by infringement proceedings, has become far more disciplined and responsible, can also be made.

Award procedures are based on the expectation that no material changes occur between the outset of the process and the award of the contract. This is underlined by a rule in German law (transposed correctly from the Procurement Directives) that offers must not be changed after being submitted to the awarding authority.[102] Therefore, if the need for changes becomes apparent during a procedure, each situation has to be considered thoroughly. Decisions have to be made taking account of the principles of non-discrimination, fair competition and transparency in particular. But any changes in the final tender prior to the actual award of the contract run a very strong risk of falling foul of the principle of non-discrimination. Thus, material changes to final tenders are basically excluded at that stage.

The above applies in general in respect of changes made post-contract award, but for different reasons. With regard to post-signature changes to procurement contract terms, German law sets out certain rules under the VOB/B and VOL/B.[103] Even if such changes may be possible under these regulations, it would be necessary to take account of the applicable procurement regime. In addition, Germany strictly adheres to

[102] An exception to this rule applies to negotiated procedures and the competitive dialog.

[103] For example 'contract changes due to a modification of the construction plan' (§2(4) of VOB/B) *etc.*

the possible departures from the rule, as set out in *Pressetext*[104] which means that it does not allow any other amendments to an already concluded public contract.

Unlike the situation in Germany, one of the most common manipulations in the award of public procurements in Bulgaria is precisely the amendment of a public procurement contract that has already been concluded in accordance with applicable rules. Explicit rules restricting the possibility for contract amendment are provided in the PPA,[105] although they do suffer from certain faults, which were highlighted in chapter 2. The preliminary ruling in *Pressetext* is also taken into account by appellate authorities which monitor the lawful conduct of the

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[104] Case No C-454/06 *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [2008] ECR I-4401.

[105] PPA, Art. 43(1) to (3): '(1) The parties to a public procurement contract may not amend the said contract; (2) An amendment to a public procurement contract shall be introduced by means of an additional agreement to the contract and shall only be admissible on an exceptional basis: 1. Where, for reasons brought about through unforeseen circumstances: (a) the time limits of the contract cannot be complied with, or (b) activities within the subject matter of a procurement for works or service have to be partially replaced where this is in the interest of the contracting authority and does not lead to an increase in the value of the contract, or (c) goods within the subject matter of a procurement for supplies, including the elements, components or parts thereof have to be partially or completely replaced where this is in the interest of the contracting authority, does not lead to an increase in the value of the contract and the replacement goods meet the requirements of the terms of reference, having technical advantages and/or better functional characteristics than the replaced goods, or (d) the total value of the contract has to be reduced in the interest of the contracting authority awing to a reduction of the agreed prices or of agreed quantities or abandonment of activities, or; 2. (repealed); 3. Upon change of State-regulated prices where an activity whereof the price is subject to State regulation is a principal subject matter of the public procurement contract and the period of performance of the said contract exceeds twelve months, or 4. Where the price has to be increased owing to the adoption of a statutory instrument: up to the amount arising as a direct or indirect consequence from the said instrument, or 5. Upon extension of the duration of a supply contract or service contract requiring periodic or continuous performance, provided that the following conditions are simultaneously fulfilled: a) not later than six months before the end of the duration of the contract the contracting authority has initiated a procedure with the same subject matter for a subsequent period which has not been completed by the selection of contractor; b) the duration of the contract is extended until the selection of a contractor but by no more than six months; c) an interruption in the supply or service would lead to substantial difficulties for the contracting authority; 6. In contracts under Art. 3(2) of a value exceeding BGN 50 million for reasons brought about by events unforeseeable at the time of conclusion of the contract and as a result of which the contract affects the legitimate interests of any of the parties; (3) The change of the price in pursuance of Item 3 of Paragraph (2) shall be admissible up to the amount of the actual increase of the costs incurred by the contractor which has resulted from the change of the State-regulated price'.

procurement. On the one hand, Bulgarian provisions are more restrictive with regards to the allowances made by the Procurement Directives. For completely unmotivated reasons the legislator ties contract amendment to the presence of 'unforeseen circumstances'. This precludes any possibilities for contract amendment for purely objective reasons without running the risk of substantial amendments which require a separate procurement and restrict competition. The restrictiveness of this provision is justified by the anti-corruption intent of the legislator but its negative impact on the normal conduct of business is greater than the desired effect against corruption. The PPA (and applicable by-laws) fail to provide specific rules related to practical application, as opposed to, say, modification of construction plan,[106] which may require contract amendment. The opinion of professional organisations and contractors in the preparation of the new procurement package in Bulgaria which will transpose the New Procurement Directives will be crucial in the approach to be taken on this point. Much more appropriate provisions should be adopted, consistent with actual practice, which would not obstruct normal business operations in the operation of public procurement, and, at the same time, will allow the underlying anti-corruption restrictions to be as meaningful as possible and to reap positive results.

In addition to the above, the lack of adequate *ex ante* control following contract conclusion in Bulgaria allows the almost unhindered implementation of corruption schemes, because, as has been explained in previous chapters, a large portion of corruption schemes are implemented by of oral agreements between the contracting authority and contractors. These in reality, introduce significant changes to the contract but the changes remain untraceable due to the lack of sufficient control over efficiency, to complement legality control.

By way of summary, German rules and imperative norms could serve as a stepping stone for Bulgarian legislation wherefrom Bulgaria could introduce imperative restrictive and sanctioning norms against behind-the-scenes modifications to public procurement contracts. In this light, the Bulgarian legislative framework needs refashioning and it would be prudent, when drafting the new law reflecting the new EU Directives, also

[106] See *supra* note 103.

to consult on how legal norms regulating amendments to the contract following its conclusion could be properly formulated and, in a separate vein – how control over contract implementation could be affected. Once again, though, such a legislative change would be insufficient in the absence of the relevant mindset for observation of imperative rules and prevention of any attempts at their circumvention.

9.2. MODERNISED AND ONLINE CONDUCT OF PROCUREMENT PROCEDURES REDUCING THE HUMAN FACTOR

Germany proceeds in full compliance with the general policy of the EU for complete transition to e-procurement. Among the demands for transparency and reduced corruption in public procurement set out in the German NIS Report 2012, published by TI Deutschland,[107] were those for implementation of a central platform for mandatory publication of public tender procedures. Nowadays this requirement is more or less a fact. German and EU tenders are centralized and accessible on several e-tender platforms - e-Vergabe, bund.de[108] and others. Further, there is a well-developed e-Governance system, which German citizens are free to use and perform many administrative obligations via electronic platforms. This reduces bureaucracy tremendously and enables authorities to offer high-quality services in the shortest of time frames and at perceptibly decreased administrative costs. Some older systems such as 'BundOnline2005' also facilitate centralized electronic procurement procedures in federal administration.

In this respect, transposition of the New Procurement Directives will not place Germany in the position of having to restructure its legislative system and to allocate budget funds for the creation of electronic award

[107] See *supra* note 10.

[108] bund.de is partner of 'Deutschland-Online' – an e-government strategy, which secures a gateway to the services and online information of German federal administrations. Two years ago the Ministry of Interior launched another government communication system – the so called De-Mail, which will enable and facilitate the exchange of electronic documents between citizens and public authorities over the internet. There are also other initiatives in place aiming to digitalize the entire German administration.

platforms, as will be the case in Bulgaria.

A key difference between the public procurement award models in the two countries is precisely the development of electronic platforms. In Bulgaria electronic tenders are already a fact, but for the most part moving to full e-procurement is, for the time being, a chimera. The CPCCOC and BORKOR projects made specific efforts towards the creation of electronic platforms for the promulgation, award and control of public procurement procedures in unison with EU's ambitions for future e-procurement, as already described in previous chapters. Unfortunately, the Bulgarian state demonstrates negligible progress in this direction because of factors such as lack of financial resources, lack of political will and the constant postponement of the launch of e-government in Bulgaria.[109]

The development of e-procurement is one of the most significant factors in the fight against corruption and Bulgaria will have to conform to European trends and the requirements of the New Procurement Directives to completely switch over to e-procurement by 2018 at the latest. The German example is invaluable in this respect and BORKOR employs German experts endeavouring to introduce and reorganise a portion of the German model to match Bulgarian needs. However, the creation of electronic award and control platforms should not be an end in itself. On the contrary, this step is directly connected to other matters such as urgent legislative changes, training of officials and complete overhaul of the communication system between contracting authorities and participants – all of which are currently regarded as far too expensive and difficult for Bulgaria.

Currently, the main excuse offered by the Bulgarian state is the lack of financial resources for realization of the BORKOR project or of any other project (if such exists) aiming to achieve the transition to electronic award of the spending of public resources. In addition, any project, including the BORKOR project, sooner or later falls prey to political games, appetites for attractive posts and governmental changes, which have, in reality, crushed all attempts at the development of e-procurement

[109] The last development in the e-government strategy for the period of 2014-2020 is the decision that Bulgaria needs to reach the average European level of e-government by 2020.

up to the present.

Overwhelmed by the anticipation of the New Procurement Directives and by the constant criticism towards the rampant corruption in the sector, the Bulgarian legislator has adopted several measures towards transition to e-procurement. The 2014 amendments to the PPA[110] introduced some of the platforms proposed by the CPCCOP, such as e-Audit and e-Monitoring.[111] These reforms, however, are still in the realm of theory and the letter of the law only; they do not have any actual and practical effect. The criticism remains that this legislative change has been introduced in correspondence with part of the New Procurement Directives prior to their complete transposition and prior to a complete overhaul of the legal system for public procurement and its harmonisation with new rules, and, what is worse, once again – by the piece. What is more, precisely for e-procurement, Europe grants an additional 2-year period following transposition of the remaining provisions and this rush of the Bulgarian legislator in the current situation is somewhat inexplicable.

An indisputable fact is that e-procurement will reduce, several times over, the weight of the human factor in the award process and consequently, subjectivity in the evaluation, restriction of competition and corrupt attempts at procurement manipulation. This process, however, must be completely in tune with the legislative framework and with all other anti-corruption measures and provisions introduced for that purpose.

Naturally, a legal analysis could hardly be expected to determine whether the German model is the best, most expedient or efficient for Bulgarian purposes but the conclusion that the main weapon against the widespread corruption in this sector would be its removal from human hands, is undeniable.

In connection with e-procurement, the development of whistleblowing and software-based anti-corruption systems is of great importance as well. Despite severe criticism at local level and the lack of official whistle-blower hotlines in the public sector, there is a well-developed system in Germany for whistle-blower protection offered to

[110] SG 40/2014, effective as of 1.7.2014 and 01.10.2014, respectively.

[111] See chapter 4.

public sector employees on the basis of the law.[112] Civil servants are able to report cases of suspected corruption directly to law enforcement agencies.

Germany is much criticised for the lack of specific protection with regard to private sector whistle-blowers. According to German institutions, however, existing laws provide sufficient safeguards for private sector employees which give them the opportunity to confidently use the so-called hotlines. A whistleblowing system which has expressly been noted as good practice in Germany[113] is the Business Keeper Monitoring System (BKMS) based on online portal software, used for processing anonymous reports. The BKMS, used for instance by the authorities in Lower Saxony, ensures anonymity for electronically submitted corruption reports and aims to facilitate the early and effective disclosure of risks within companies and public authorities. The BKMS is regarded as an especially effective system for detection of high-level corruption because, as opposed to other systems, it is formulated to guarantee absolute whistle-blower anonymity. Hensgen observes that the 'innovation of the certified BKMS System lies in the anonymous dialogue between whistle-blowers and an examiner directly at the customer's site (anti-corruption officers, ombudsmen, audits and examinations with the company or administration), so that whistle-blowers can be notified about the processing status or can further be questioned about the matter of facts.'[114]

Further, as a consequence of the development of whistleblowing systems in Germany and in response to criticism by Transparency International[115], there have been some initiatives for the implementation of a corruption register at federal level, as well as in several federal states (for example, Hamburg and Bremen, Berlin and North Rhine-Westphalia, Schleswig-Holstein). The corruption register is to contain a list of unsound companies and/or persons (due to bribery, illegal employment,

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[112] The Act on Federal Civil Servants (*Bundesbeamtengesetz*) and the Act on the Status of Federal Civil Servants (*Beamtenstatusgesetz*).

[113] See *supra* note 12.

[114] *Ibid*, p. 37.

[115] *Policy document on Public Procurement and Anti-Corruption Strategies*. (2011). Berlin: Transparency International Deutschland.

infringement of competition law, and so on). Listed companies and persons must be excluded from the award of public contracts. So far these federal initiatives have not been successful. Corruption registers only exist at the level of the *Länder* although the legal basis varies from *Land* to *Land*.[116]

Over the last decade, the introduction of hotlines in Bulgaria has been decidedly encouraged in larger state institutions. Their existence has become something of a trend which has been picked up by different bodies such as the Bulgarian Industrial Association, the Ministry of Interior, the Ministry of Transport. The fact is, however, that the launch of hotlines (in the form of telephone services and not of a comprehensive software system similar to the German BKMS) has not resulted in the exposure of large cases of corruption, least of all in the field of public procurement. Nor has it resulted in the 'emancipation' of Bulgarian civil servants,[117] enabling them to develop a sense of trust and confidence in the anonymity guaranteed by hotlines.[118] The existence of such hotlines is rather a formality which does not bring about the exposure or prevention of cases of corruption. Consequently, Bulgarian reality may probably benefit from a comprehensive whistleblowing system similar to the German one or any other software-based system serving to detect corruption loopholes (the Bulgarian BORKOR project has made an attempt at introducing another widely used German anti-corruption model – the V-model),[119] and from the elimination of hotlines, which once again depend on the human factor, as the main anti-corruption model.

As for the so-called 'blacklisting', the earlier review of Bulgarian legislation noted that the PPA also contains a similar clause regulating the creation of blacklists for bad contractors (as commented in previous

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[116] A debate in the German Federal Parliament took place recently on whether such corruption registers should be established at a federal level. However, this debate did not result in the adoption of a corresponding law.

[117] These often seem to be still reliving memories from the totalitarian period and the anti-democratic methods for information collection imposed in those times.

[118] Germany is among the few Member States that publish comprehensive statistics on cases reported to the police and on criminal investigations. In 2011, the Federal Criminal Police noted 46,795 corruption cases reported *to* the police, and 1,528 ongoing investigations,

[119] The V model is a software product created in 1999 to be used mainly for government defence projects. It has already been adopted by several countries as it is regarded as both efficient and relatively easy to use.

chapters). This provision failed to produce any significant results in Bulgaria, hence this tool appears to not be a consistently efficient and adequate measure in the fight against corruption in public procurement. This once again demonstrates that the existence of provisions is one thing, but ensuring their effectiveness is quite another.

9.3. CENTRALISED PROCUREMENT

In addition to everything discussed so far in terms of different anti-corruption methods and policies used by Germany, central purchasing bodies as one of the final pillars which appear to make a substantial contribution to the successful German policy in the fight against corruption in public spending, should also be highlighted. The German government and the separate *Länder* make use, to the maximum extent, of the option provided by the Procurement Directives for the creation of central purchasing bodies (Article 11 of Directive 2004/18/EC). As has already been noted in this study, Bulgaria has had one attempt at developing such a body which, unfortunately, was not particularly successful in terms of functionality and anti-corruption effects. The CPCCOC propose the expansion of such a centralized structure and the creation of one similar to the German model. As was observed in the analysis of CPCCOC activities in chapter 4, the proposal is, in itself, positive (although the figure of the Central Public Procurement Services, as proposed by the Solution Model of CPCCOC, is burdened by too many and often contradictory functions and is subject to conformity with Bulgarian legislation), but is scarcely feasible under the current public procurement legislation in Bulgaria. Bearing in mind, however, that by 2016 Bulgarian legislation needs to be harmonised with the New Procurement Directives, it is entirely possible that the new legal framework could be formulated in such a way as to provide an opportunity for new central purchasing bodies, especially given that the new procurement legislative package actually expands the functions of such bodies and the possibilities for their use, and even creates, in addition, the element of the procurement service provider. The option exists, if not for the entire procurement process and contractor selection to be carried out by the intermediate element in the face of the central purchasing body,

then at least for part of the process to be facilitated in this way.[120]

The question arises as to why the award of public procurements by means of a central body can be seen as an efficient anti-corruption measure. The simplest answer might be because such system would involve at least one more entity that has to be bribed in order to win the contract. On a more serious note, any method of separation of the individuals requiring certain supplies or services from those engaged in the implementation and control of the contractor-selection procedure constitutes a serious obstacle to the employment of most known corruption schemes. Central purchasing bodies take on the functions of a contracting entity which acquires supplies and services designated for one or more contracting entities by organising public tenders for those supplies and services. This authority may also conclude framework agreements for works, goods or services designated for one or more contracting entities. Contracting entities may depend on central purchasing bodies for all steps – from publication of the notice acting as the call for competition to the final implementation of the resulting procurement or procurements. Contracting entities may transfer their legal obligations to the central purchasing body but only to the extent to which the central purchasing body accepts obligations related to certain stages. Where, however, certain stages of the award procedure or actual contract implementation are undertaken by the contracting authority, the latter will continue to carry the responsibility for those obligations, as set out in the Procurement Directive. Regardless of the fact that central purchasing bodies are generally used for more standard supplies/services and mostly for the conclusion of framework agreements, '[a] central purchasing body may very well offer both standardised products and services of non-strategic importance and products and services of significant strategic importance. In the latter case, the centralised arrangement is often driven by the owner's objectives to improve administrative efficiency and effectiveness within the public sector as a whole by ensuring interoperability and standardisation of the administrative systems used by contracting

[120] By means of: (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services; (b) advice on the conduct or design of public procurement procedures; (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned (Directive 24/2014/EU, Art. 2(15)).

authorities'.[121]

In Germany almost every region[122] has its own central purchasing body which assists the activities of the separate contracting entities while at the same time ultimately cutting short any close contacts between the actual contracting entity and potential bidders. The choice falls entirely into the hands of the central authority which, in this case, acts as an independent intermediary.

For example, the functions of the Federal Ministry of the Interior (*Beschaffungsamt*) in its capacity as the central purchasing body[123] are as follows: (i) Procurement of goods (cargo and services), including preparation of all documents required under a specific public procurement as well as the implementation of measures to guarantee the quality of goods designated for proper functioning of the Federal Ministry of the Interior; (ii) Provision and maintenance of an e-procurement system; Management of framework agreements, coordination of the interaction of public procurement award offices differentiating between standard activities and products by means of framework agreements with the central purchasing bodies of the different areas within the decision of the Federal Government with view of procurement optimisation; (iii) Collection, aggregation and, where necessary, forwarding of data, including statistics, acquired in the course of the procurement procedures; (iv) Consultation with the Ministry of the Interior on all issues related to the procurement awarding *etc*.

As discussed above, this differentiation and the resulting relative independence from the actual contracting entity is a good approach to the fight against corruption which could underlie the new Bulgarian legislation in the field of public procurement and could serve to reduce subjectivism in the assessment of candidates. Naturally, such a legislative change should not and cannot remain, as has so far been the case, just a theoretical aspiration. The necessary legal leverage and sanctions need to be created

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[121] *Central Purchasing Bodies*. (2011). SIGMA Public Procurement Brief 20, p. 7.

[122] Logistik Zentrum Niedersachsen, Hessen Central Procurement Authority *etc*.

[123] See Bescha.bund.de, (2015). *Beschaffungsamt - Startseite*. [online] Available at: http://www.bescha.bund.de/DE/Startseite/home_node.html [Accessed 4 Jun. 2015].

to safeguard the interests of the actual contracting entity and to support the anti-corruption element. The analysis of the different types of violations in PPA application, however, does not help define which could be the central entities for this much-needed panacea, especially at the contractor selection stage, due to the fact that in reality the person to be bribed for the purpose of selection of the favourite candidate would simply be replaced by another. Such a differentiation would, though, be especially efficient in counteracting the corruption schemes aimed at bending the parameters of already concluded contracts. As noted above, this is currently the most obscure stage in the development of a procurement procedure. Quite often the contract signed between the parties is only the framework which defines the price to be paid to the contractor and which serves to meet publicity and transparency expectations. Control at contract implementation level, as regulated by Bulgarian legislation, is weak and inefficient. The introduction of a central purchasing body would resolve this problem as it would obstruct the possibility for subsequent arrangements with the actual contracting authority. The agreement of certain conditions with the central purchasing body and their inclusion in the contract would make subsequent modification in negotiation with the actual contracting entity far more complicated, bearing in mind the division of responsibility between the central authority and the contracting entity and the distribution of their control functions. What is more, following implementation of the New Procurement Directives, the selection of contractors based on the 'lowest price' criterion will (usually) remain a thing of the past. In this case the objective selection of the bidder on the basis of the 'most economically advantageous tender' on behalf of the central authority and the subsequent corrupt arrangement at the contract implementation stage (one that is beneficial to both parties) will be significantly obstructed.

10. WHAT CONCLUSIONS CAN BE DRAWN AND WHAT CAN BULGARIA LEARN FROM GERMANY?

The analysis of the public procurement award system in Germany and its comparison to the state of the Bulgarian system in terms of corruption and the fight against it, has resulted not only in highlighting good German practices which could be borrowed by Bulgaria but also in a more comprehensive outline of the elements missing from the Bulgarian model.

The main conclusion is that regardless of the legislative changes needed in a certain country and regardless of how public spending is regulated, a key factor is the actual implementation, control and sanctioning of these norms. The cycle of efficient and/or preventive measures against corruption in the award process can be defined as complete only if combined with an efficient judicial system and a much larger number of initiated anti-corruption proceedings and of proceedings concluded with an enforceable judgment. This means that the legislative changes that can be borrowed from Germany comprise only a small portion of the weapons needed in the fight against corruption in public procurement – undeniably the main portion, but not the only one.

Germany, however, is an invaluable example which Bulgaria can follow not only with view of the legislative framework – which, compared to the Bulgarian one, is rather more schematic, mainly outlining essential terms, rights and obligations[124] – but also with view of its application in practice. Instead of imperatively binding a huge number of transparency rules into statutory norms despite which corruption schemes are easily effected (as can be seen in Bulgaria), Germany has opted for methods which facilitate publicity but also for control over the activities of both

[124] This comment refers mostly to the main German laws. Some of the acts, created by the individual regions, which regulate procurement (and are beyond the scope of this study) can turn out to be more detailed or complicated, but the main parameters, rights and obligations of participants in public procurement procedures are set out in a very specific, clear and plain manner and are not subjected to quarterly bouts of supplementation and amendments, which creates an atmosphere of stability in the application of the provisions and confidence with regards to the rules that need to be observed for the lawful conduct of the award. These are all elements and features of the legislative system which are painfully absent from the Bulgarian PPA and the relevant by-laws.

contracting authorities and contractors. Just one of the examples in this direction is the electronic platforms for e-procurement which are constantly being developed. Restricting the human factor is of great significance for the achievement of a corruption-free environment and is definitely a good practice which should be borrowed at all costs, a practice for which it is high time that financial resources are found in Bulgaria instead of nonsensical criticism against the investment in software and e-platforms.

Another important point is the efficient institutional apparatus in Germany. The entire development of the award and implementation stages of a public procurement in Germany depends on the well-oiled administrative apparatus,[125] which exercises control over the activities of contracting authorities and promptly sanctions any irregularities. In addition, the efficient judicial system and the National Court of Auditors act as controlling and sanctioning bodies and also have a restraining and disciplining effect on all participants in the award and implementation process. The comment made by Horn is very indicative of this point: 'With regard to the roughly 2,000 rulings of the German award review bodies over the last 10 years, one may come to the conclusion that a 'culture of enforcement' has been well established in Germany for pan-European contract awards.'[126] According to the statistics of the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*) for 2013 there have been 817 appeals before the procurement tribunals, as first instance of appeal, and 189 second instance appeals before the High Regional Courts.[127]

Last but not least, the existing central purchasing bodies could also be regarded as a viable option and their functioning could commence

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[125] In 2014, the First EU Anti-Corruption Report (see *supra* note 11, p.3) expressly highlights that 'Detailed rules regulate the work of the public administration. Comprehensive codes of conduct aim to prevent corruption at federal level and in many *Länder*. According to research, 99% of the authorities contacted apply the 'four eyes' principle, whereby two individuals must approve important decisions, 80% have internal anti-corruption guidelines, 74% randomly monitor decision making where the risk of corruption is more prevalent, 62% have identified areas with high corruption risks, and 57% have appointed an anti-corruption commissioner. […]. Certain German municipalities, such as Hamburg, provide examples of local best practice for fostering integrity in the public sector.'

[126] See *supra* note 41, p. 76.

[127] As cited by Brakalova – see *supra* note 20, p. 119.

simultaneously with the changes in the Bulgarian legislation upon reception of the New Procurement Directives. This is obviously a well-functioning mechanism which limits subjective contracting authority-candidate relations, and the relations between contracting authority and bidders. Separation of the functions of the actual user of the goods, services or supplies from those of the individual carrying out and controlling the procedure introduces a very active party to the procedure which, in addition to serving as a buffer to potential corrupt intent also constitutes an additional control body with regards to the entire procedure. What is more, according to the new procurement package, central purchasing bodies will be the first to move onto complete e-procurement (by 2018) which will further serve to strengthen the anti-corruption element of their functions by not only mediating the award process on behalf of the contracting authority, but also by freeing participants from the interference of the human factor in the selection process.

Although the option for central purchasing bodies is not recent and has already been introduced into the Bulgarian PPA on the basis of European legislation, its application in Bulgaria is almost non-existent and is completely inadequate. This is why the German model is highly relevant and why the adoption of this model would serve as a positive start in the fight against corruption. The introduction of such authorities requires substantial restructuring and reorganisation of the existing model, both in Bulgaria as a whole and in the separate municipalities, acting as contracting authorities. If, however, such a rupture in relations between contracting authorities and potentially bribing bidders could, as hoped, be accomplished according to the German model, these efforts would be fully paid off many times over.

In addition to everything that has been discussed so far, the ‘door’ behind this chapter should be closed with a comment which gives meaning to the comparative analysis between the Bulgarian and German award system and the implementation and control over public spending. Ensuring transparency at every step and with regards to every action of the contracting authority is not the key element in the fight against corruption in the sector for its own sake. Without downplaying the importance of adequate and proportional provision of information in the award process, Bulgaria needs to focus on ensuring a wider competitive environment, on flawless and timely control and the creation of provisions with a clear

disciplining action if it truly aims to limit the handing out of procurements to pre-selected candidates. This aspect perhaps needs to be taken into account in the annual monitoring report of the EU received by Bulgaria. The mantra 'increasing transparency in public procurement' needs to be replaced by more constructive advice and analyses of the actual state of public procurements and legislation on a more practical level. Indeed even avowed champions of the transparency principle in public procurement admit that a '[c]areful balance would have to be drawn between the expectations of full transparency and other considerations […] [T]ransparency is not an all cure remedy to corruption. Over-reliance on transparency may not be always appropriate as it may also have counterproductive tendencies under certain circumstances.'[128]

[128] Osei-Afoakwa, K. (2014). How Relevant is the Principle of Transparency in Public Procurement? *IISTE: Journal of Developing Country Studies*, Vol.4, No 6, p. 145.

Chapter 7

AUSTRIA

'Never neglect an opportunity;
Change at the right moment,
Sometimes be constant…'

'Cosi fan tutte' W.A.Mozart
Act 2, Scene 1, Despina

Austria is the second country which will be compared to Bulgaria. Its good practices in the fight against corruption in public spending will be highlighted, while taking note of the transparency rules which Austria chooses to adopt in its legislation. The problematic areas similar to those abundant in the procurement award process in Bulgaria will also be outlined, as well as the different methods for their resolution adopted by the two countries. It is precisely in this respect that benchmarking with Austria is particularly interesting for this study - the similarities between the legislative systems of the two countries are greater than those between Germany and Bulgaria, hence the different mechanisms employed by Austria in the fight against corruption in public procurement can be outlined more easily.

The choice of this particular country for the benchmarking analysis is once again guided by several major motives which make up the logical component of the comparison - corruption levels, efficiency of the procurement system, historical, substantive and economic connections with Bulgaria. The main statutory rules regulating public procurement will be examined, as well as existing transparency and anti-corruption rules.

The comparison with current Bulgarian solutions again aims to draw a clear dividing line between the mandatory provision of a torrent of information and demonstrative publicity in the award process as a means in itself, and truly effective anti-bribery measures.

1. WHY AUSTRIA?

Legislative similarities

As with Germany, the Austrian legal system is of continental type, but is even more similar to the Bulgarian one in terms of legislative structure. What is more, being EU Member States Austria and Bulgaria adhere to European values and harmonise their national legislation according to EU law.

In addition, Austria holds a historic place and has a significant role in the creation of Bulgaria's post-liberation[1] legal system and in the process of Europeanisation of commercial and economic relations regulation in Bulgaria from the 19th century onwards. Although not directly adopted, one of the masterpieces of Austrian legal thought, which recently marked its 200th anniversary, the Austrian Civil Code (*Das Allgemeine Bürgerliche Gesetzbuch*),[2] has had a major impact on Bulgarian law, particularly in civil proceedings. The Bulgarian Civil Procedure Code of 2007 was drawn up with extensive assistance from leading Austrian procedural experts.[3]

The legislative framework of acts regulating the award of public contracts is in many ways very similar to the Bulgarian one (the resemblance here is much greater than with the German framework). Despite its division into districts, Austria has a single public procurement

[1] As was noted in the previous chapter, this term refers to the period after liberation of Bulgaria from Turkish rule, lasting five centuries, and restoration of the Bulgarian state; historically this period runs between 1879 and 1920.

[2] Enacted 1881.

[3] Dr. Peter Bauer, Dr. Peter Joham, Dr. Oscar Kolman.

act,[4] as does Bulgaria, and there are several similarities with the Bulgarian PPA. Given Austria's federal structure, each of the nine districts has its own procurement legislation[5] (as is the case in Germany), but it is focused mainly on the regulation of the appeal proceedings in front of the district court. Nevertheless, the desire of the Austrian legislator is that the main act regulating public procurement in the country be as imperative as possible, setting out all fundamental elements in procurement awards, appeals and implementation. The text, however, follows that of the Procurement Directives as closely as possible in order to preclude any ambiguous interpretations,[6] which is a major difference from the current legislative basis in Bulgaria. Austrian secondary legislation supplements its primary legislation and facilitates the actions of contracting authorities in the separate districts but cannot derogate from the main rules which apply with equal force for all.[7]

An active procurement player in Austria is the Federal Public Procurement Agency (*Bundesbeschaffung GmbH*, BBG) which has similar functions to the Bulgarian PPAgency and regulates and controls the award process. Quite separately from these functions, however, the BBG is also a central purchasing body in Austria with its own Code of Conduct with respect to anti-corruption measures, as will be discussed further below.

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4 Regulating this subject matter only, separately from the laws regulating competition (as opposed to the German model).

5 Which fell out of the scope of this research.

6 In addition, Austria is one of the Member States which tends to codify preliminary decisions of the ECJ, once again with the aim of achieving clarity and ensuring maximum focus of regulation into a single main legal text.

7 In this context see also Michael Fruhmann in the ch. re Austria in ed. Neergaard, U., Jacqueson, C. and Ølykke, G. (2014). *Public Procurement Law: Limitations, Opportunities and Paradoxes*. in: The XXVI FIDE Congress in Copenhagen. Copenhagen: Congress Publications Vol. 3, p. 221. *et seq*. Fruhmann defines the close link to the New Procurement Directives as one of the specifics of Austrian legislation in the field of public procurement, but also comments that this is not always possible 'Furthermore, it must be said that (award) legal concepts of the Union legislature is often difficult to or cannot be classified in the historically evolved systematic of the national legal system' ['*Ferner ist zu konstatieren, dass (vergabe)rechtliche Konzepte des Unionsgesetzgebers oft nicht oder nur schwer in die historisch gewachsene Systematik des nationalen Rechtssystems eingeordnet werden können*'].

Investments

Over the last ten years or so, Austria has remained at one of the topmost positions in terms of investments in Bulgaria. It surpasses even Germany and comes directly after the Netherlands. Between 1996 and 2011 Austria has been among the leading investors in Bulgaria with a total investment volume of EUR 5.8 bln. or 14.6% of the direct foreign investment in the country for the period.[8] Reciprocally, trade in goods and exports of Bulgarian products to Austria have also increased significantly – from EUR 234.4 mln. in 2009 to around EUR 400 mln. in 2013.

Over the last 2—3 years there has been a slight decline in Austrian investments in Bulgaria which (in addition to the global economic crisis) can be interpreted precisely in the context of the lack of investment security 'Bulgaria must improve its image abroad. It needs to show foreign investors, including Austrian stakeholders, that it is a place enjoying legal security, dependability and predictability.'[9]

Corruption level

For 2014, according to the CPI of Transparency International, Austria comes 23th of 175 countries with a score of 72 points, which ranks the country 11th among all EU Member States, approximately ten points behind Germany, the United Kingdom, Belgium and France.

There have been several significant corruption scandals in Austria over the last few years which have increased the public 'perception of corruption' and this has had an immediate effect on CPI levels.[10] From this

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8 Data provided by Bulgarian National Bank.

9 Angerer, M., Commercial Counsellor at the Austrian Embassy in Bulgaria, in an interview for Economy.bg, (2014) [online] Available at: http://www.economy.bg/home/view/12233/Avstrijskite-firmi-vse-po-chesto-autsorsvat-proizvodstvo-kym-Bylgariya [Accessed 3.6.2015].

10 In the field of public procurement, the most widely discussed scandal involved a former interior minister allegedly receiving kickbacks in return for awarding a contract for a new digital police radio network, totalling several millions of EUR; he was sentenced to 4 years in jail. Further, a deputy governor of the Austrian central bank was one of a group of nine people charged in connection with bribes allegedly paid to win contracts to supply banknotes to Azerbaijan and Syria. A former deputy chief executive of Telekom Austria was convicted of diverting funds to the Austrian party Freiheitliche Partei Österreichs - FPÖ and also received a prison sentence. In 2012 the Austrian

point of view Austria is all the more interesting for analysis and comparison to Bulgaria because, following criticism at European level and low evaluations from non-governmental organisations (something that occurs on an annual basis in Bulgaria as well), Austria has focused on launching anti-corruption measures in several spheres, some of which are already bearing fruit. The analysis below discusses precisely those measures and examines the possibility of whether they could have a positive effect in Bulgaria as well.

Regardless of the increased corruption levels, the situation in the country and its role as a major economic player make Austria a reliable benchmarking source, especially so given the fact that Austria ranks corruption as 11th from among a total of 16 factors hindering business, while for Bulgarians corruption comes first.[11]

The First EU Anti-Corruption Report of 2014[12] comments on problematic areas and the need to improve anti-corruption measures but also acknowledges the serious attitude demonstrated by Austria in its efforts to further minimise corruption.

With regards to corruption in the field of public procurement, the results for Austria are as follows:

> 'According to the 2013 Eurobarometer Business Survey 38% of business representatives think that corruption is an obstacle to doing business, and 41% of them think nepotism and patronage is also problematic in this context. 18 % of those who participated in public procurement in the last three years reported that they were prevented from winning because of corruption. Respondents in Austria reported tailor-made specifications for particular companies in 66% of cases, which is above the EU average. Collusive bidding was reported as a widespread practice by 57%. In addition, 45% of respondents

Green Party released a report on a parliamentary corruption investigation, estimating that corruption reduced the nation's economic output by about 5%, or EUR 17 billion.

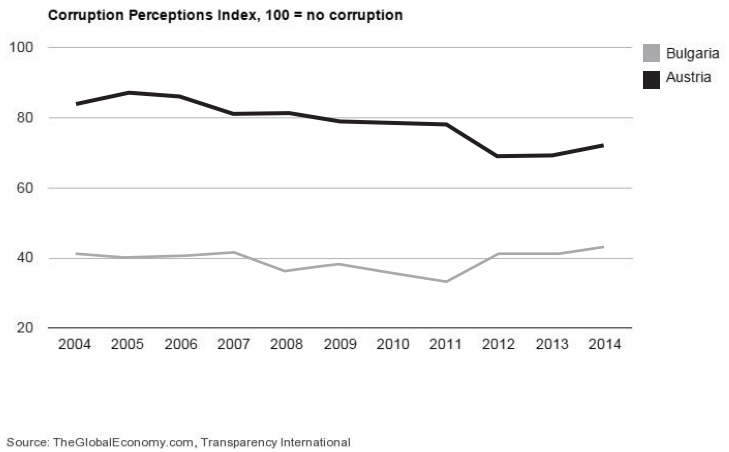
11 Schwab, K. and Sala-i-Martín, X. (2014). *The global competitiveness report 2014-2015*. Geneva: World Economic Forum, pp. 116 (Austria) and 136 (Bulgaria).

12 *First EU Anti-Corruption Report*. (2014), Brussels COM(2014) 38 final.

noted conflicts of interest in the evaluation of bids and 35% pointed to unclear selection or evaluation criteria. According to the World Economic Forum's Global Competitiveness Report 2013-14, Austria is ranked the 16th most competitive economy in the world, out of 152 countries.'[13]

Once again, for comparative purposes as to Bulgaria levels, below are the tables drawn by Globaleconomy.com,[14] which illustrate all critical differences in a more straightforward manner:

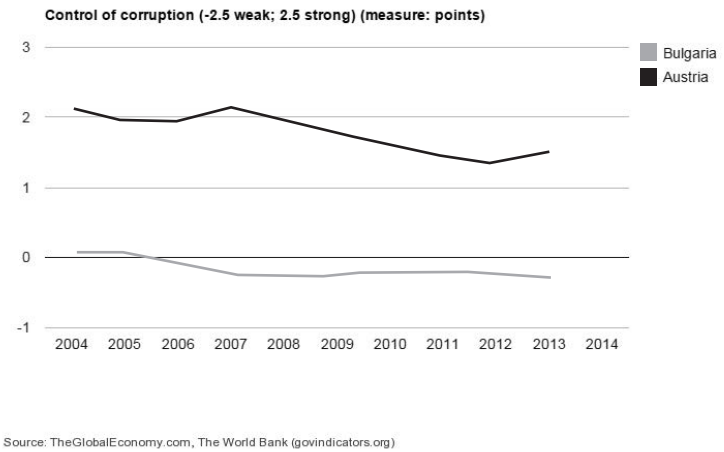
Fig. 1 Movement of CPI (2004-2014):



[13] *First EU Anti-Corruption Report*. (2014), Brussels, COM(2014) 38 final, Annex 20 – Austria, p. 3.

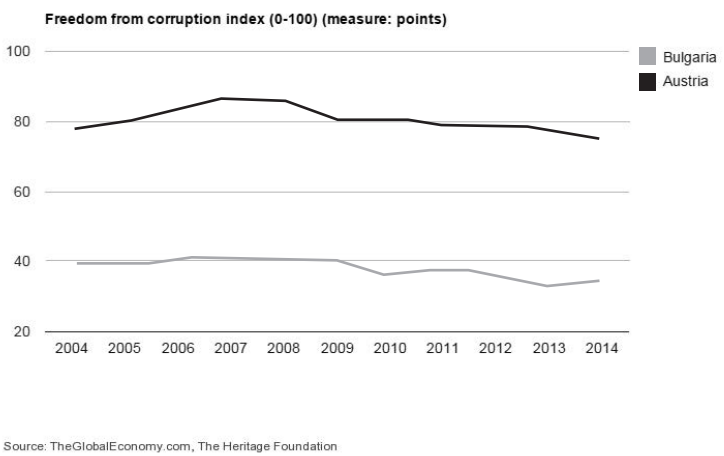
[14] TheGlobalEconomy.com, (2015). *Compare countries, compare economies, compare indicators | TheGlobalEconomy.com*. [online] Available at: http://www.theglobaleconomy.com/compare-countries/ [Accessed 3.6.2015].

Fig. 2 Control of corruption (2004-2014):



Source: TheGlobalEconomy.com, The World Bank (govindicators.org)

Fig. 3 Freedom from corruption (2004-2014):



Source: TheGlobalEconomy.com, The Heritage Foundation

Public procurement system

There are many more similarities to be found between Austria and Bulgaria as regards to the manner in which public procurement is organised than between Bulgaria and Germany. These similarities will be distinctly highlighted and discussed in the comments below. It should, however, be noted that Austrian rules in the field of public procurement do not tend to go further than the European rules set out in the Procurement Directives. Regardless of the similarities with the Bulgarian system in terms of structure and organisation, there is no such abundance of transparency rules as in the Bulgarian PPA, nor is there such a fixation with additional requirements causing unnecessary burdens for all participants in the award process. While there are specific regional rules, they are also free of superfluous hyperbolisation of transparency rules or 'anti-corruption measures' leading, for example, to overloading contracting authority officials with requirements for overly detailed documentation, which is exactly what is happening in Bulgaria after one of the latest amendments to the PPA effective as of 1 July 2014.

Socio-economic differences

Naturally, when comparing the legislation, good practices and effective methodologies of the two countries account has to be taken of their differences, which are not only of a legal, but also of a socio-economic, cultural and lifestyle nature. This was done with Germany in the previous chapter as well.

Austria is a federal state, divided administratively into nine federal provinces, and is a parliamentary democracy. Austria ranks 21st in the world in terms of gross domestic product *per capita*. It enjoys a high living standard and a socially-oriented market economy, which, up until the Eighties was, to a large extent, state-owned. Following accession to the EU speedy privatisation took place. Nowadays the balance between the private and public sectors is comparable to the average level in the EU. With its well-developed market economy and qualified work force, Austria is strongly connected to other economies in the European Union, particularly to that of Germany. The global financial crisis led to a severe,

but short-lived recession, the consequences of which were put under control as a result of the adopted stabilisation measures.[15]

As for Bulgaria, there is not much to add to what has already been stated in the course of the comparison with Germany. Over the last decade, successive governments have demonstrated commitment to economic reforms and responsible fiscal planning. However, despite the favourable investment regime, including low, flat corporate income taxes, the standard of living is far from high, and, against this background, trust in the political and judicial systems has collapsed completely. 'Corruption in public administration, a weak judiciary, and the presence of organised crime continue to hamper the country's investment climate and economic prospects.'[16]

Again, for visualization purposes and to graphically highlight the social and economic differences between Austria and Bulgaria, reference is made to information supplied by globaleconomy.bg on the parameters economic growth, gross domestic product, government costs, administration efficiency and regulatory quality:

[15] Austrian GDP fell by 3.8% in 2009 but saw positive growth of about 2% in 2010 and 2.7% in 2011. Growth fell to 0.6% in 2012.

[16] Popov, G., [Popov and Partners] (2013). *Analysis of Good European Practices in Quality Management of the Judiciary*, Sofia, upon request of the Supreme Administrative Court, pp. 7-8.

Fig. 4 Difference in the economic growth (2004-2014):

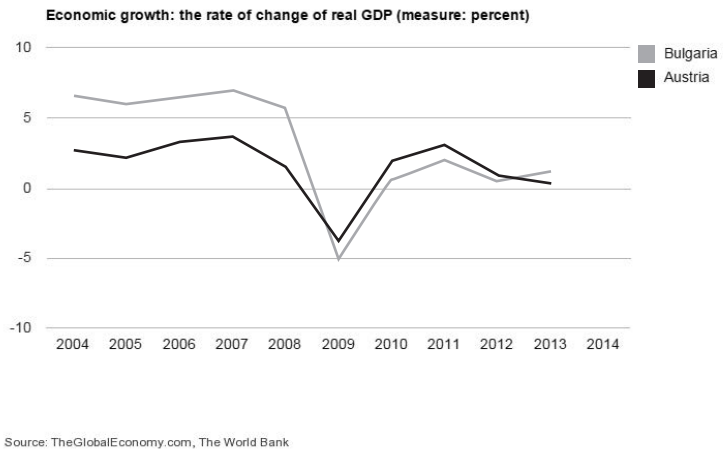


Fig. 5 Movement of Gross Domestic Product (2004-2014):

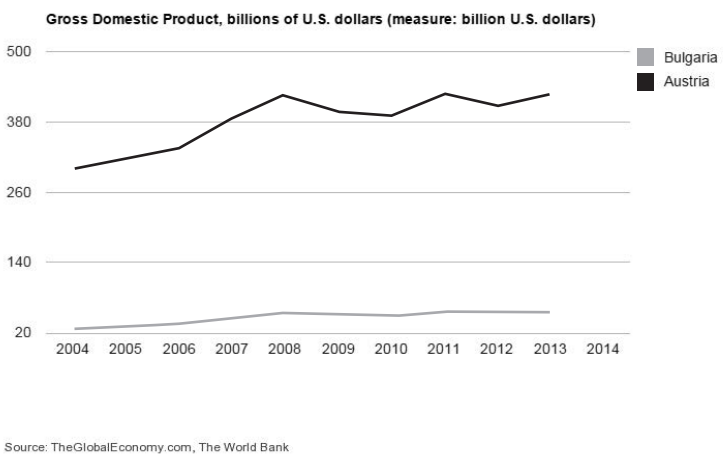


Fig. 6 Government spending (2004 - 2014):

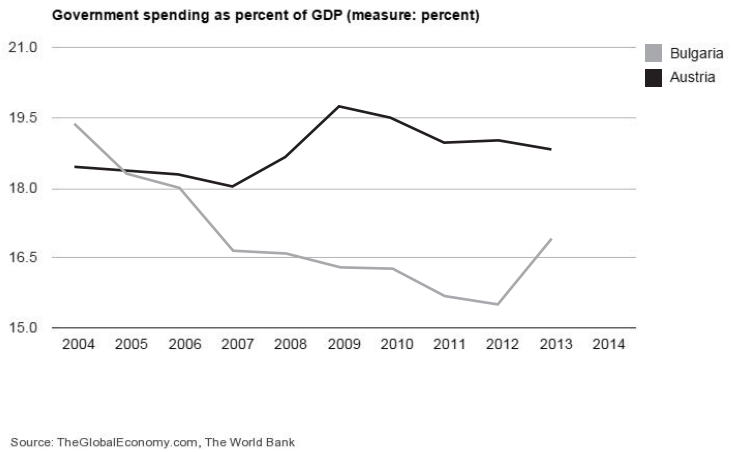


Fig. 7 Administration efficiency (2004 - 2014):

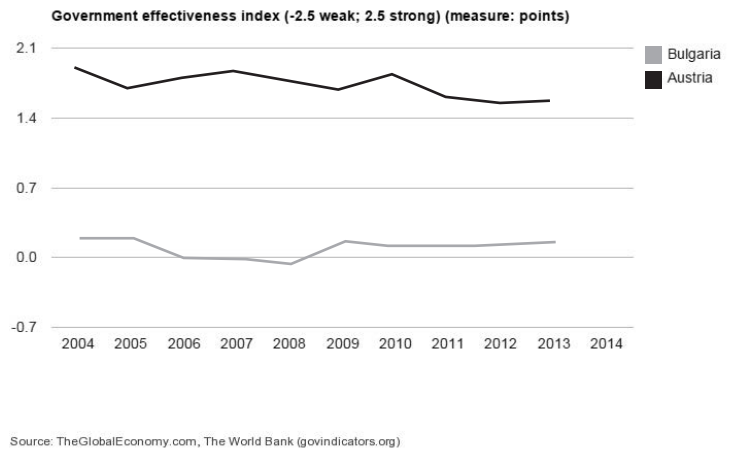
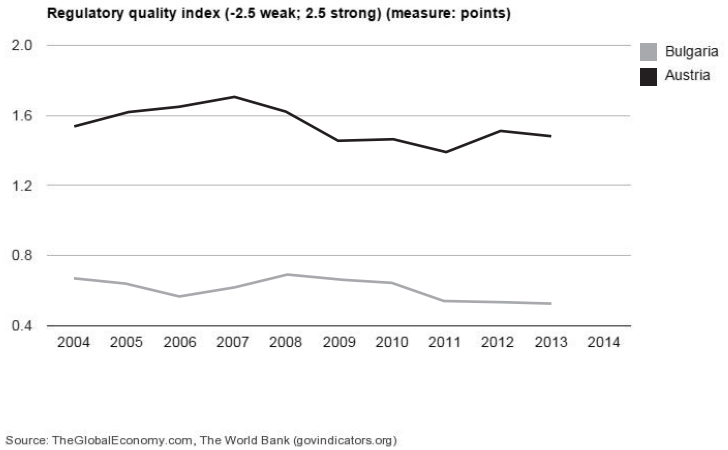


Fig. 8 Regulatory quality (2004 - 2014):



Austrian Public Procurements – statistical review

According to the Annual Procurement Review 2011 of the European Bank for Reconstruction and Development,[17] the awards by country of origin of the tenderers and by contract type for 2011 for Austria are at a total value of EUR 52,337,038[18] and are all for works contracts.[19] For Bulgaria the same value is EUR 6,111,269. The public procurement sector in Austria forms around 16-18% of the national gross domestic product. The volume of public spending (including purchase activities out of the scope of the procurement law) amounts to a bit more than EUR 34 bln.

[17] *Annual Procurement Review 2011* (2012). European Bank for Reconstruction and Development, Procurement Department.

[18] *Ibid,* p. 16 and Annexes 2, 4 and 6.

[19] Current data for Austria is not available for comparison.

2. MAIN CHARACTERISTICS OF AUSTRIAN PUBLIC PROCUREMENT SYSTEM. APPLICABLE LEGISLATION

The current Procurement Directives have been fully transposed and implemented into Austrian legislation since 2006. Further, as in Bulgaria, the award of public contracts in Austria is regulated by a designated legal act which implements the directives and regulates the award process conducted by both 'classical' and 'utilities' contracting authorities. This is the Federal Procurement Act (*Bundesvergabegesetz*, BVergG).[20] A separate act regulates public procurement in the field of national security and defence.[21] As noted above, each of the nine districts employs its own legal acts, applied in accordance with the specifics of the respective district and local appeal rules.[22]

The BVergG sets out the main award principles and rules and all types of procedures, methods of control and appeal. A significant aspect of the Austrian system which resembles the Bulgarian solution (but differs from the German one) is that these strict rules apply both to procurement above European thresholds and to those falling below them.[23] Austria has several mechanisms in place to facilitate procedures below the relevant threshold,[24] [25] and, as might be expected, the EU-wide notice of the tender

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[20] BGBl. No 17/2006, as amended.

[21] The Federal Defence and Security Procurement Act (Bundesvergabegesetz Verteidigung und Sicherheit, BGBl. I Nr. 10/2012, as amended) which has transposed Directive 2009/81/EC OJEU L 216/76, 20.8.2009, as amended. This piece of legislation is not part of the present study.

[22] *Burgenländisches Vergabe-Nachprüfungsgesetz*, LGBI. Nr. 34/2003), as amended*; Kärntner Vergaberechtsschutzgesetz*, (LGBI. Nr. 17/2003, as amended*; NÖ Vergabe-Nachprüfungsgesetz*, LGBI. Nr. 7200-0, as amended*; Oö. Vergabenachprüfungsgesetz*, LGBI. Nr. 153/2002, as amended*; Salzburger Vergabekontrollgesetz*, LGBI. Nr. 103/2002, as amended*; Steiermärkisches Vergabe-Nachprüfungsgesetz*, LGBI. Nr. 43/2003, as amended*; Tiroler Vergabenachprüfungsgesetz*, LGBI. Nr. 123/2002, as amended*; (Vorarlberger) Vergabenachprüfungsgesetz*, LGBI. Nr. 1/2003, as amended and *Wiener Vergaberechtsschutzgesetz*, LGBI. Nr. 25/2003, as amended.

[23] BvergG, §12 - §18.

[24] In this context see ed. Bianchi, T., Guidi, V. (2010). *The Comparative Survey on the National Public Procurement Systems Across the PPN*, pp. 1-4; Stalzer, J. (2015). *Austria Chapter - Public Procurement 2015*. [online] International Comparative Legal Guides. Available at: http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2015/austria [Accessed 3.6.2015] *etc*.

[25] BVergG 2012 introduced a few measures designed to simplify procurement procedures and reduce costs. For instance, the contracting authority is no longer obliged to demand any evidence from the candidates and tenderers in

invitation is not mandatory. Direct awarding is thus possible in Austria if the expected value of the procurement is under EUR 100,000.[26] [27] Bulgarian legislation also sets out additional national thresholds and simplified procedures that apply only to procurements falling below these national thresholds. The main difference between the two legislative solutions, however, arises from the far more complicated regulatory system in Bulgaria, where the contracting authority must observe both European thresholds and national thresholds, which in turn differ depending on whether the procurement concerns a service, works or supplies.[28] In addition, there are thresholds which allow award via public invitation (thresholds for low-value contracts).[29]

Such solution has its advantages and can be observed in other European states as well.

> 'The following Member States have essentially the same regulations for below- and above-threshold contracts: Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, the Slovak Republic and Sweden. The main variation from the provisions of the above-threshold regime concerns the provision of proof of qualification requirements.'[30]

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order to establish their suitability, not even from the successful tenderer. Another simplification concerns references in order to establish the required technical capacity. The candidates and tenderers may now present references obtained during the last ten years, if the contracting authority so decides.

[26] This threshold will be valid until 2016, in compliance with the latest extension from 27-28.9.2014; this is a positive step towards preserving the possibility for 'authorities to award small and medium-sized contracts unbureaucratically and efficiently' (see Stalzer, J. (2014). *Austria: Extension of the threshold regulation until the year 2016*. [online] Available at: http://www.schoenherr.eu/knowledge/knowledge-detail/austria-extension-of-the-threshold-regulation-until-the-year-2016 [Accessed 3.6.2015]).

[27] Further, there are also specific exemptions and thresholds for certain procedures below the EU threshold, such as the direct award procedure with prior publication (below EUR 130,000 - §41a of BVergG) or the negotiated procedure without prior publication for purchasing additional services (below EUR 103,000 – BvergG, §38(3)).

[28] PPA, Art. 14(1) — (5) & Art. 45c.

[29] PPA, Art. 14(4).

[30] *Public Procurement in EU Member States -The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives*. (2010) SIGMA Papers, No. 45, OECD Publishing; also [online] Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives. (2010). *SIGMA Papers*. p. 17.

The countries which have selected this approach aim to provide strict control even at the level of smaller procurements, and this approach tends to facilitate the procedure to some extent, as the regime is, essentially, the same for all procurements (with the relevant exceptions) regardless of the thresholds. Of course, there are procedures for which the award process has been considerably facilitated. This mechanism is in place in both countries and is subject to continuous improvement in the search for the most successful model.[31] A higher level of control is intricately linked to a higher level of operation and efficiency of supervising and law enforcing institutions. It is precisely for this reason that a comparison between the two countries is so interesting: most reports[32] note an increase in corruption levels in Austria over the last few years, but what is more peculiar is that the public is clearly aware of the topic of corruption and acknowledges the increase as a phenomenon in itself, but this does not in any way undermine the prestige and authority of the legal system, supervisory and administrative authorities in which Austrians tend to place a great deal of trust.[33]

The above demonstrates a major difference from the Bulgarian situation, where corruption is indeed a serious problem in the award of public procurement. Failure to cope with the problem, however, does not originate solely from legislative shortcomings but is caused, to a much greater extent, by the inept control apparatus and the inefficient judicial system. This conclusion is supported by a further analysis and comparison of the two countries. Like Germany, Austria has an exceptionally high percentage of initiated, corruption-related proceedings as well as a high conviction rate. This has a huge hindering and preventive effect on future corruption. In Bulgaria legal proceedings in the field can be counted on the fingers of one hand while those which have culminated in an effective

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[31] 'For procurement procedures below the thresholds a 'lighter' and more flexible regime for the award of contracts has been established', see ed. Bianchi, T., Guidi, V. (2010). *The Comparative Survey on the National Public Procurement Systems Across the PPN*, p. 1.

[32] See *First EU Anti-Corruption Report*. (2014), Brussels COM(2014) 38 final, Annex 20 – Austria; *The Special Eurobarometer Report 374 Corruption*. (2012). TNS Opinion & Social at the request of Directorate-General Home Affairs *etc*.

[33] *The Special Eurobarometer Report 374 Corruption*. (2012). TNS Opinion & Social at the request of Directorate-General Home Affairs, p. 102.

sentence are even fewer. This effectively encourages contracting authorities and contractors whose activities remain unsanctioned, while the overall perception of impunity aids the implementation of new and novel corruption schemes aimed at embezzling taxpayers' money.

In this connection the conflicting conclusion regarding the approach of regulating public procurement by means of an almost identical set of rules both above and below the relevant thresholds is especially intriguing. This model obviously works for Austria, although voices can always be heard in support of even further simplification of contracts below the thresholds. In Bulgaria, despite the rather more rigid rules, their application on the one hand, does not result in more efficient control and, on the other, tends to obstruct the award process. Often a simplified procedure is initiated in the absence of legal prerequisites for the purpose, as is the case in negotiated procedures without notice, and, unsurprisingly, corruption thrives. Bulgaria faces criticism for the excessively complicated manner in which individual thresholds are determined, which also impedes the effective fight against corruption. The clearer, less ambiguous and less interpretative the legislative framework is, the easier it would be to detect corruption chicanery. Moreover, the law would not provide fertile ground for justification of technical or deliberate errors in the determination of the proper regime. As a result the considerable loss of public funds is expected to diminish.

3. MAIN PRINCIPLES. TRANSPARENCY OBLIGATIONS

Austria implements the mandatory EU principles in public spending - free and fair competition, equal treatment of the bidders, non-discrimination. Even the texts of §19 and §187 of BVergG which are analogous and list the principles of contract award governing the actions classical or utilities sector contracting authorities explicitly highlight 'considering the Union-legal basic freedoms as well as the discrimination prohibition'.[34]

[34] Part of the text BvergG, §19 and §187.

The two texts (targeting classical and utilities sector contracting authorities) list the different social principles primarily dealing with non-discrimination against foreign contracting entities or certain professions, the employment of women, the elderly, the disabled *etc*. In addition, the principles explicitly set out the rule that contracts are to be awarded to qualified, efficient and reliable entrepreneurs only, and at adequate prices (this is also the case in Germany).[35] The texts also respond to the obviously growing trend for socially-oriented legislation, precisely of the type offered by the New Procurement Directives which are currently being transposed by EU Member States. There is no separate text or reference to the transparency principle in the entire BVergG. What is more, several of the specialist works on the public procurement award system in Austria do not explicitly list transparency as a fundamental principle.[36]

As explained by Steiner, '[i]n Austria a general transparency principle in an act does not exist, but the whole administration is based on the Principle of Legality (*Legalitätsprinzip*) to ensure that every act of the administration is determined by law. [...] In any other case of public contracts no special method of transparency is necessary, because the administration is required by law to treat each case legally and like other, similar ones.'[37]

The transparency principle may be detected in a broader interpretation of the provisions of the BVergG and in the analysis of other stand-alone texts referring to the promulgation of procurements (*Bekanntmachungsbestimmungen*).[38] The BVergG does not set out any exceptional measures for the observation of publicity and transparency nor

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[35] BvergG, §19(1), 2nd sentence. &§187(1), 2nd sentence: '*The award shall be made to authorized, efficient and reliable contractors at reasonable prices*'.

[36] See *e.g.,* Stalzer, J. (2015). *Austria Chapter - Public Procurement 2015*. [online] International Comparative Legal Guides. Available at: http://www.iclg.co.uk/practice-areas/public-procurement/public-procurement-2015/austria [Accessed 03.06.2015]; *Lex Mundi 2009 Public Procurement Guide,* Lexmundi.com, (2009). [online] Available at: http://www.lexmundi.com/Document.asp?DocID=5953 [Accessed 3.6.2015]. pp. 3-7 *etc*.

[37] Noguellou, R. (2010). *Droit comparü des contracts publics / Comparative law on public contracts*. Bruxelles: Bruylant, p.390.

[38] Promulgation in the OJEU, promulgation in Austria, promulgation in the media *etc.* (BVergG, §50 *et seq.* for classic contracting authorities; BVergG, §207 *et seq.* for utilities sector contracting authorities).

does it introduce any rules which differ significantly from those prescribed by the two Procurement Directives.

The rules for the promulgation of procurements applicable to classical and utilities sector contracting authorities are almost identical, with one exception added by the legislator – namely the obligation for publication in a daily newspaper or electronic procurement platform for those procurements which fall below European thresholds.[39] This is similar to the Bulgarian model. The contracting authority announces the procurement, although there is variation between districts as well.[40]

In compliance with the Procurement Directives,[41] the BVergG has also provided the option for contracting authorities to use the 'buyer's profile' (*Beschafferprofil*) to announce the main elements of the procurement. This, however, is neither mandatory for the contracting authority, nor is it bound by any time limits the non-adherence to which could lead to administrative sanctions.[42] According to the BVergG:

> 'Contracting authorities may publish a buyer profile on the Internet. The buyer profile may include notices, information on ongoing procurement procedures, scheduled purchases, contracts concluded, revoked procedures, and any other information concerning a procurement procedure or information of general interest such as

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39 BvergG, § 55 *et seq*.

40 The public procurement notifications are published on a national level, depending on the district in the: (a) Official Journal of the Viennese Newspaper (*Amtsblatt zur Wiener Zeitung – Amtlicher Lieferungsanzeiger*), online: www.wienerzeitung.at; www.lieferanzeiger.at; (b) Online platforms: www.auftrag.at; (c) the nine local publication media - Official Journal of the city of Vienna (*Amtsblatt der Stadt Wien*); Official News of the province of Lower Austria (*Amtliche Nachrichten Niederösterreich*), Official Journal of the state of Burgenland (*Landesamtsblatt für das Burgenland*), Official Journal of the state of Upper Austria (*Amtsblatt für Oberösterreich, Linzer Zeitung*), Official Journal of the Authorities, Departments and Courts of the state of Salzburg (*Amtsblatt der Behörden, Ämter und Gerichte Salzburgs, Salzburger Landeszeitung*); Official Journal of the state of Styria (*Amtsblatt für die Steiermark, Grazer Zeitung*), Official Journal of the Authorities, Departments and Courts of the state of Tyrol (*Amtsblatt der Behörden, Ämter und Gerichte Tirols, Bote für Tirol*), Official Journal of the state of Carinthia (*Amtsblatt des Landes Kärnten, Kärntner Landeszeitung*), Official Journal of the state of Vorarlberg (*Amtsblatt für das Land Vorarlberg*).

41 Directive 2004/17/EC, Art. 35. In the New Procurement Directive 2014/24/EU the 'buyer's profile' is regulated in Art. 48.

42 BvergG,§48 for the classical and §209 for the utilities sector contracting authorities.

point of contact, telephone or fax number, postal address and e-mail address'.[43]

In addition, the BVergG also defines the minimal requirements for information to be published on the respective platform (if different from or supplementary to the OJEU) while allowing additional freedom to the separate *Länder* to set out more specific rules in this respect. The main publication requirements for procurements are set out by the Chancellor in a set of rules which are then promulgated in the 'Federal Journal' of Austria and are deemed mandatory.

The Bulgarian solution of overloading the PPA with publicity requirements for each and every individual document issued in the course of the award process and the requirement to upload such documents on the official site of the contracting entity and to retain them for a number of years differs significantly from the Austrian model. The Austrian legislator has judged that normal functioning and implementation of the award procedures requires a level of transparency that allows control and improves competition in the sector concerned, but not such a level as to obstruct the entire award process and burden the contracting entity both in terms of time and costs (as is the case in Bulgaria, especially after the amendments to PPA from 2014).[44]

The Austrian model does not render all publication and information options provided by the Procurement Directives mandatory, so that each and every document produced by a contracting authority, regardless of its significance, is to be scanned and published, at the very least, in the buyer's profile – this to be done simultaneously with publications in other places. Only the minimum information package is published, in compliance with the requirement that no participant shall be discriminated against through lack of information regarding a certain procedure, which would limit competition. On the whole the Austrian legislature does not seem bent on turning the publication of all sorts of information on ongoing procurements into a 'mantra' against corruption in the sector as seems to be the case with its Bulgarian peer, the National Assembly.

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[43] BvergG, §48(1) & (2).

[44] SG 40/13.5.2014, effective as of 1.7.2014 and 1.10.2014 respectively.

As will demonstrated below, the measures which Austria finds useful to implement are aimed at changes in control authorities and improvement of their functions and efficiency, and at simplification of some of the award rules, but not at stretching publicity and transparency rules beyond recognition.

There are voices to be heard in Austria urging for increased publicity – this, however, is normal for any efficient democracy, and, in some cases there are even certain legislative changes in this direction but these are not viewed as an end in themselves, nor are they directed steadfastly towards the fight against corruption in the public procurement sector. For example, in 2011 'the Federal Public Procurement Office held that even award decisions with respect to non-priority services must now contain the same information as all other such communications. […] [T]he contracting authority must inform unsuccessful bidders of the characteristics and relative advantages of the winning tender, the name of the successful tenderer and the award sum, regardless of the fact that Section 131 of the act (which provides that the award decision must contain this information) does not apply to non-priority services.'[45]

Despite this, the motives of the Federal Public Procurement Office are not solely based on the desire to achieve greater transparency for the purposes of anti-corruption policies but are rather aimed at ensuring that, in the event of an appeal, involved bidders will have sufficient information in order to receive adequate legal protection.[46]

4. CONTRACTING AUTHORITIES UNDER BVERGG

According to §3 of BVergG, *first tier contracting authorities* are the State, each separate region, the municipalities and the municipalities

[45] Müller, B. (2011). Court requests greater transparency for award decisions; International Law Office, (2011). *Court requests greater transparency for award decisions*. [online] Available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=63a0a8da-bcb0-4723-9687-4873c1c5985b [Accessed 3.6.2015].

[46] The applicable BVergG now sets out the specific obligations in terms of the minimum content of the award decision to apply to non-priority services – see BVergG, §141.

associations. *Second tier contracting authorities* are entities which have been established (a) for the specific purpose of meeting needs in the general interest, which do not have an industrial or commercial character, and (b) which do have legal capacity at least in part[47] and (c) whose business is for the most part financed by public agencies from the first tier or other bodies in the second tier, or whose operations are subject to supervision by the latter, or whose management is made up of members of the latter. *Third tier contracting authorities* are any possible associations between the first and the second tiers. In addition, the BVergG also applies to entities engaged in *utilities sector activities* (energy, water, transport).

The constant expansion of the set of companies and their associations which fall within the scope of the definition 'body governed by public law' must not be ignored. All sorts of combinations of associations, including private companies owned by the state, can be possible contracting authorities, obliged to apply BVergG. It should be noted, however, that expansion of the scope of the 'body governed by public law' figure in Austria corresponds to the general European trends and fully conforms to the rules set out in the Procurement Directives. What happens in Bulgaria is quite the opposite, as has already been demonstrated – on the pretext that the government chooses to be more restrictive and to exercise control over more companies, the scope of these 'bodies governed by public law' is continuously expanded. This is due to incorrect transposition of European norms and results in obstructed award and control process with the constant addition of organisations which are not obliged to observe the provisions of the PPA (see chapter 3). On the other hand, such organisations may (theoretically and in practice) be an easier target for corrupt intent in the choice of contractors for their supplies, services and works, as has already been analysed.

The award system in Austria is deemed to be of the decentralized variety and use of central purchasing bodies is not as widespread as it is in Germany, for example. The *Länder* usually carry out most of their procurement through the administrative organisations of the regional governments. There is, however, a trend for central purchasing bodies to

[47] Hospitals, universities, Austrian national television *etc*.

act in the regions, as well as for procurements to be organised by cross-regional-border central purchasing bodies.[48]

In 2001, precisely with view to streamlining the procedures and in connection with some budgetary restrictions, the Austrian procurement agency BBG was established. The BBG is a limited liability company to handle the procurement of services and supplies for the federal state and its companies. The BBG's functions are similar to those of the Bulgarian PPAgency but it also acts as the central purchasing body for the Federal Government of Austria. The BBG provides central procurement services, 'in particular to negotiate framework contracts and make them available to the agencies. Its primary tasks are to bundle requirements to obtain better prices and terms from suppliers and to standardise public purchasing to reduce processing costs and legal risks.'[49] As a contracting entity, the BBG observes BvergG's requirements for exclusion of corrupt participants from all award procedures. Its functions are aimed mainly at saving award resources, which in practice means that BBG monitors for the efficient spending of the resources. The BBG is a non-profit organisation providing free services to their mandatory clients, *i.e.* the federal institutions, who are obliged to procure through the BBG unless they are able to obtain the same product under better conditions elsewhere.

The main tasks of the BBG are organisation of public tenders[50] and establishing of frame contracts for federal authorities or for public entities (on special request); catalogue management regarding concluded contracts, goods and services; the definition of purchasing strategies and purchasing marketing strategies; implementation of standards and specifications, and control. The BBG is focused on rationalisation of purchasing decisions by standardising and consolidating requests, promotion of e-commerce; using e-procurement-tools, and simplification of internal procurement procedures. The activities of the BBG are public activities, and it is funded by the Ministry of Finance. It purchases 27

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[48] See *Final Report Cross-Border Procurement Above EU Thresholds* (2011). EU Commission, DG Internal Market and Services, p. 70 *et seq.*

[49] Bbg.gv.at, (2015). *Bundesbeschaffung GmbH: About the Federal Procurement Agency*. [online] Available at: http://www.bbg.gv.at/english-information/about-the-fpa/ [Accessed 3.6.2015].

[50] Examples of products procured by the FPA: energy, fuels, transport, IT, newspapers, books, insurance; cleaning.

groups of goods mainly for the needs of the federal administration. The purchases made by the agency result in approximately 15% economies for the state. The volume of public contracts is about EUR 1 billion per annum, where 70% of the orders arise from the federal system and the remaining 30% - from public organisations (federal provinces).[51] [52]

As the largest central purchasing body, over the last few years the BBG has developed its own compliance mechanism: an anti-corruption strategy, aimed at combating corruption in the award system. It has adopted a code of conduct, to be signed and observed by each BBG employee. In fact this is perhaps the only specific anti-corruption measure created distinctly with regard to public procurement and not as a general measure, as will be discussed further below.

In one of its most recent reports the OECD[53] highlighted the BBG's mechanisms as reflecting good practice in the efforts against attempts to taint public procurement in Austria.

> '[BBG's] [a]nti-corruption Strategy has been developed mainly as a tool for preventing corruption. In order to achieve this, BBG defined actions which have to be taken into consideration: (a) Precise organisational procedures (clear definition of roles and structures); (b) Anti-corruption measures need to be integrated in the workday life; (c) The strategy needs constant reassessment and improvement; (d) Raising awareness of staff is done constantly; (e) Sharpening the focus on the consequences of corruption. The Strategy is based on three main pillars: the obligation of conducting transparent procurement procedures, the active commitment against corruption and the anti-corruption directive.'[54]

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[51] 173 contract award procedures were carried out in 2007, of which 5 were appealed without a single repealed decision.

[52] Summarized data, collected [online] Available at: from http://www.bbg.gv.at/english [Accessed 3.6.2015].

[53] *Compendium of Good Practices for Integrity in Public Procurement.* (2015). OECD, GOV/PGC/ETH(2014)/REV1.

[54] *Ibid*, p. 20 *et seq.* Further, the survey sets out that '[t]he anti-corruption directive is a compliance management tool for the prevention of corruption. It contains an explicit regulation of the main values and strategies regarding prevention of corruption, clear definition of grey areas (*e.g.*, the difference between customer care and corruption;

As opposed to legislation and the relevant by-laws regulating the award and implementation of public procurement, the strategy adopted by BBG attaches due importance to transparency but relegates it solely to practical mechanisms providing internal control over the activities of employees engaged in the award process. 'The four eyes principle' is strictly observed, as well as the division of functions, rotation of staff and other mechanisms which protect competition in the choice of contractor. In addition to this, the BBG introduces several additional internal obligations through its code of conduct, which are mandatory for its employees. Employees are not permitted to accept any gifts and any attempted bribery of an official will be promptly exposed. Also, like other institutions combating corruption (the Federal Bureau of Anti-Corruption and the Prosecution Service), the BBG organises constant training and seminars for its employees in order to ensure proper knowledge of all corruption risks and the measures applicable to each type.[55]

The practice of combining a 'public procurement institution' with the central purchasing body, as is the case in Austria, is especially advantageous. This approach combines two fundamental functions and the agency, as the main organisational structure for the entire procurement award and implementation process. It can serve as an example to other contracting authorities as to how to conduct procurement in the most expedient manner. In Bulgaria, the PPAgency has mainly organisational and analytical functions but does not act as a central purchasing body. Of course, the PPAgency is a public procurement contracting authority and does, indeed, award contracts itself, but only for its own needs. In its capacity of contracting authority however, the PPAgency does not provide resources to other contracting authorities. In this it differs from the BBG. The BBG's efforts to be an example and a model for anti-corruption behaviour are not followed by the PPAgency.

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what is permitted, what not), clear rules on accepting gifts as well as rules on additional occupation. It also offers the employees a clear view on the emergency management'.

[55] The reports of the Austrian Audit Office on BBG activities also differentiate between anti-corruption policies and the strategies they impose. For example, see *Bericht des Rechnungshofes - Bundesbeschaffung GmbH, Follow–up–Überprüfung*, Bund 2011/8, Anon, (2011) [online] Available at: http://www.rechnungshof.gv.at/fileadmin/downloads/2011/berichte/teilberichte/bund/bund_2011_08/Bund_2011_08_3.pdf [Accessed 3.6.2015].

As was noted in the chapter dedicated to Germany, the overall trend in Europe is for increasing the use of centralised purchasing bodies which can support the process and act as a barrier against attempts to 'fix' procurement procedures; the New Procurement Directives expand the functions of central purchasing bodies and stimulate their creation and utilization. According to the Comparative Survey on the Transposition of the New EU Public Procurement Package,[56] Austria, like most other Member States, finds that the use of central purchasing bodies (as a form of aggregated procurement) is definitely beneficial and intends to continue to use them.[57] Additional benefits of the adopted approach arise as a result of the anti-corruption model elaborated by BBG. Concentrating all these functions into a single institution allows it to place itself, by means of its employees, 'on both sides of the barricade' and to acquire significant practical experience as to how procurement award and implementation is actually carried out. This helps to highlight the actual transparency rules which need to be created and observed. It is on this basis that BBG created its code of conduct – by using its own experience in the award process. Thus it defines its employees' obligations and restricts them from certain activities with the purpose of bribery prevention, and places them under strict internal control in order to make their actions transparent, but takes care not to turn control into a stumbling block for the administrative apparatus.

As opposed to the BBG's functions, the PPAgency focuses on (a) the issuance of methodological guidance with view of ensuring a unified national policy in the field of public procurement; (b) the timely transposition of European legislation; (c) monitoring of the public procurement market; (d) maintenance of a public procurement portal and register. This latter activity ensures implementation of publicity and transparency principles; all European procurement procedures are entered into the register (even those whose value is lower than European thresholds but higher than national ones). The most important role of the PPAgency from the point of view of national anti-corruption strategies is

[56] *Comparative Survey on the Transposition of the New EU Public Procurement Package.* (2014). Department for European Union Policies, Italian National Anti-Corruption Authority, Presidency of the Council of Ministers.

[57] *Ibid*, p. 14 and p. 42 *et seq*.

related to its control functions which have been expanded in recent years, as noted in previous chapters. The Bulgarian legislator sought to increase the options for *ex ante* control over more sensitive procurements, *i.e.*, those financed entirely or partially with European funds and negotiations without tender notice. This control has a preventive function and is a form of methodological assistance. In essence, this type of control differs significantly from the *ex post* control exercised by NAO and PFIA, which has a sanctioning effect. Control exercised by the PPAgency does not aim to administer punishment, but aims to prevent the commission of sins. Its main task is to minimise risks which may arise upon conclusion of contracts under which payments may subsequently be required to be refunded due to violations in the rules for utilization of public funds.[58]

In reality, the functions of the PPAgency serve as a corrective to the actions of actual participants in the procedures, or, rather, mainly those of contracting authorities. The PPAgency, however, lacks the resources (financial, for the time being, and human) to undertake wider functions - even as it is, the Agency is struggling due to having to exercise *ex ante* control as well as to provide guidance on application of the law. For this reason the PPAgency is often slow to act and is unable to respond to all inquiries as to the application of the highly complicated legal framework. Often questions placed by participants are urgent as they concern a specific procedure but the PPA is unable to provide a timely answer.

In searching for good anti-corruption practices, suitable for Bulgaria, the BBG approach stands out as decidedly positive and appropriate solution for Bulgaria. Since the Bulgarian state does not have the necessary experience for the PPAgency to also act as a central purchasing body, it could at least strengthen the role of other central purchasing bodies in the country, allowing a greater number of procurement procedures to pass through them, and to urge them to create their own anti-corruption strategies.[59] Because of the impetus given by the New

[58] *Ex ante* control exercised by the PPAgency with regards to procurements financed with European funds in reality duplicates control carried out by the Managing authorities of the respective operational programmes for European funds and hence is not unique and exclusive in nature.

[59] Such anti-corruption strategies/policies should not to remain 'on paper' only, as is the current case in some Bulgarian institutions.

Procurement Directives, the PPA may well be replaced by a completely new piece of legislation. Accordingly, the trend towards the use of central purchasing bodies is expected to increase. The problematic phases which may curb initial enthusiasm are, however, several. *First,* as has already been observed in previous chapters, at the present moment Bulgaria has one central authority which cannot boast of having achieved any particular success in the course of its existence. Unlike Austria, Germany and most Member States, Bulgaria is yet to make its first steps towards introducing central purchasing bodies. *Secondly,* it is unclear whether the focus will be mainly on straightforward transposition of the New Procurement Directives or whether Bulgarian legislature will, in addition, impose new and different structural changes to institutions and control bodies related to the public procurement award and implementation process.

As can be seen in the comparative analysis, which highlighted the main functions of the PPAgency, the latter is mainly an advisory body with regards to proper implementation of public procurement procedures. It may well be that this function will remain the leading one even after the expected legislative changes, which would be justified with the lack of resources of the institution to take on further obligations. This does not undermine the conclusion drawn here that the way which Austria has chosen for the BBG to function may turn out to be a very positive influence on the efforts of Bulgaria to tackle corruption. And, given the habit of Bulgarian legislature to retailor the PPA at least on an annual, or even semi-annual basis, this change could be reflected in legislation at a later stage.

The final difference between these two bodies in Austria and Bulgaria is the predominantly functional and practical direction of the BBG. It also has supportive functions in the entire process but is at the same time a participant in procurement procedures in its capacity as the central purchasing body; it is thus well-placed to observe actual problems in practice. Moreover the BBG's very positive practice serves as a model for the creation of a specific anti-corruption strategy which supports its functions as a contracting authority.

Unfortunately, Bulgaria stills does not have such a significant resource capacity as to allow it to cope with a similar wide range of functions to those undertaken by the BBG (such as being responsible for

the purchase of nearly 30 items). But in any event, the combination of control functions and actual award procedure implementation on behalf of contracting authorities is of utmost importance for the operation of the PPAgency, both as a corrective measure ensuring compliance with the PPA, and as an anti-corruption example to other contracting authorities.

It is clear, from the above analysis, that use of the BBG as a central purchasing body is important not so much in terms of its role as an intermediary between businesses and contracting authorities, as is the case in Germany, but in term of its role as a 'guiding light'. The positive example which this public procurement body provides while blending the two activities – advisory and practical – is a very positive approach for countries such as Bulgaria. The analysis of Austria in this respect is priceless – from genuine practice towards strategy and elaboration of anti-corruption measures and not *vice versa* – from theory to a complex and cumbersome bureaucratic apparatus created by contracting authorities.

5. PROCEDURES

In compliance with the Directives, the BvergG permits public procurement contracts in Austria to be awarded through (i) open procedure, (ii) restricted procedure (with and without prior notice), (iii) negotiated procedure (with and without prior notice), (iv) direct award, (v) direct award with prior notice, (vi) competitive dialogue, (vii) dynamic purchasing system, (viii) electronic auction, (ix) design and realisation contests, or (x) a framework agreement.

As in the case of Bulgaria, contracting authorities are free to choose between the open procedure and the restricted procedure with prior notice. The other procedures require certain conditions and imperative provisions to be met. The distinguishing features of these individual procedures are set out in the BVergG.[60]

The German legislative decision to give priority to the open procedure over other procedures is much more suitable for Bulgaria than

[60] BvergG, §25.

the Austrian approach. This is because of the anti-corruption efforts required in Bulgaria (even accepting that some business representatives would perceive such measure as a burdensome). In this case, the similarity between the Austrian and Bulgarian model can hardly be regarded as a positive feature. The wider freedom of choice works well for Austria, but would leave too many openings for corruption in the Bulgaria climate.

In the desire to simplify some of the award procedures, an additional procedure was introduced into the BVergG in 2012: direct award with prior notice.[61] This promotes a 'relaxed' regime and restricted remedies, provided again that economic operators are qualified, capable and reliable. The contracting authority is enabled to conduct the award procedure at its discretion, to decide whether to negotiate or not, to collect offers or not, or to award the contract directly. It is only obliged to publish a contract notice with minimum information for the benefit of those economic operators which will participate in the direct award. Franzmayr observes that:

> 'As to remedies, economic operators may merely challenge the choice of the award procedure and the contract notice. In contrast, the selection criteria, the selection of the successful tenderer, the withdrawal of the award or the award decision cannot be contested.'[62]

By way of comparison, the Bulgarian equivalent to this more flexible procedure is called 'public procurement award via public invitation'. This concept emerged on the legislative horizon in 2012, when the Ordinance on Small and Medium Public Procurements[63] was abolished and regulation of procurements falling below minimum thresholds was brought into the PPA. Chapter 8a of the PPA, which deals with the new, lighter regime, as noted above, envisages a simplified procurement award process for

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[61] Admissible for supply and service contracts not exceeding the threshold of EUR 130,000 and for works contracts below EUR 500,000. See (BvergG, §41a & §201a).

[62] Franzmayr, P. (2012). *Austria: Recent Public Procurement Law Introduces a New Award Procedure while a Last-Minute Regulation Dispels Confusion on Threshold Values*. [online] Available at: http://www.schoenherr.eu/knowledge/knowledge-detail/austria-recent-public-procurement-law-introduces-a-new-award-procedure-while-a-last-minute-regulati/ [Accessed 3.6.2015].

[63] Promulgated SG84/24.9.2004, repealed SG 17/28.2.2012.

procurements whose low value does not justify spending time, human and financial resources for the legally prescribed procedure.

The usual weakness of Bulgarian legislation, however, have, unfortunately, not bypassed this new form of 'relief' which is actually distinguished by a higher level of formality than the pre-existing system. The candidate selected as contractor must submit, prior to contract conclusion, a package of documents and declarations comprising the minimum set required by the PPA. In practice, contracting authorities require both these and also other declarations and documents from participants, as early as the application phase. This practice is completely wrong as the text of the PPA was intended to simplify contractor selection. Instead of achieving this goal, the contracting authority often needlessly complicates the process. In addition, the deadlines for tender submission are unrealistically short, and, it turns out than within this specific regime - because ultimately this process is not actually regarded as a public procurement award - the options granted by the typical public procurement contract (*e.g.*, contract amendment) and the procedure around such contract (*e.g.*, appeal) are precluded. This is why this legislative decision has attracted serious criticism.[64] It is contrary to European case-law[65] and although it underwent several modifications in 2014, the problems have, in essence, remained almost the same.

The lighter regime in Austria is actually rarely used since the threshold (EUR 130,000) is only slightly different from the direct award threshold (EUR 100,000). Bidders enjoy a reduced level of legal protection under this procedure, since they may only challenge the choice of the procedure, but not other decisions during the procedure. Thus, it might be concluded that neither Austria nor Bulgaria finds its legislative solutions especially adequate: they provide unwarranted loopholes for

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[64] 'In practice, the amendments to the PPA have failed to improve the award climate in Bulgaria because they have tacitly retained the previous situation; hence, no measures for protection exist for participants dissatisfied with contracting authority decisions which confirms the results from examination of tenders collected by means of a public invitation' – Bulgarian Information Service Centre at the Institute for Legal Analysis and Research. (2012). *Public invitations in Bulgaria involve routine violation of the principles of equality, transparency and non-discrimination as set out in the rules of the EU Treaty*, Sofia.

[65] *Ibid.* See Case T-258/06 *Germany. v. European Commission* [2010] ECR II-2027; Case C-6/05 *Medipac-Kazantzidis AE v Veniseleio-Pananeio* [2007] ECR I-04557, para. 33.

deviation from control frameworks and award rules. On this point the comparison does not help much towards choosing the better option because both systems suffer from specific defects, at least from the point of view of Bulgarian corruption problems.

Nevertheless the comparison serves as a good reference point, highlighting the persistently negative characteristics of a large portion of Bulgarian legislation. The Austrian model is far too 'lenient' for Bulgarian reality, while Bulgarian legislation once again demonstrates excessive complexity and the inability to safeguard the main principles of public procurement. In any event, though, the use of a simplified award procedure for certain types of procurement (defined by the Member States themselves) and for those falling below the thresholds will be significantly restricted following transposition of the New Procurement Directives which are mindful of the unwarranted application of the lighter regime and circumvention of the law. Thus, further research will be necessary to analyse the situation after transposition of the New Procurement Directives into national legislation, when at least some of the present opportunities for non-compliance with the law will be severely restricted.

6. AWARD CRITERIA

With regard to the award criteria, the two countries once again display significant similarities: they use both criteria; one does not predominate over the other, unlike in the legislative solution adopted by Germany. Hence both Austria and Germany will need to adapt to the application of only the 'most economically advantageous offer' once the New Procurement Directives are transposed, or take advantage of the option wherein the price remains the decisive factor but quality dimensions need to be taken into consideration during the evaluation.

What happens in Austria and Bulgaria on this point is of great interest.[66] Elimination of the 'lowest price' criterion, such as it has been

[66] According to the Austrian attorney Johannes Stalzer, an expert in public procurement and public private partnership law (interview made with him for the purposes of this research, dated 14.5.2015), the amendments of BvergG with respect to the changes in the award criterion (BvergG,§79(3) & §236(3)) are expected to enter into force by the end

known up to now, is regarded by EU as a step towards a more complex and more expedient contract award process. While this is not a radical change,[67] and Member States are still free to select the contractor on the basis of price as the main factor, the effect on corruption in the field cannot, as yet, be determined. Only analysis of the situation in individual Member States will provide an answer to this question in due course. The change was introduced to promote more efficient spending of public funds, because in the race towards the lowest price stakeholders often missed the truth that the cheapest service or product does not necessarily mean 'the best' offer. According to some authors '[t]he relationship between best value and anti-corruption provisions is that where contracts are awarded as a result of corrupt activity, this will have adverse implications for the best value, since corruption stifles competition and the costs of corruption may be passed onto the government.'[68] This, however, is only one side of the coin.

As already observed, there can be no certainty that the adoption of this change will have a positive effect in all Member States. With regard to the Bulgarian situation, the analysis made in chapter 5 reveals that the

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of 2015. According to Stalzer this preliminary amendment (*i.e.*, before the transposition of the whole new procurement package) aims to fight social and labour dumping and focus on quality when awarding public contracts. Therefore the amendments to the BVergG established the general priority of the 'most economically advantageous offer' criterion. The lowest price criterion shall only be applied under certain (exceptional) circumstances (such as standardised off-the-shelf works, services and supplies). Furthermore, the amendments suggest that the quality criterion has to have a sufficient strong weight in order to ensure a realistic impact on the evaluation of the best bid. Other adjustments refer to the mandatory transparency of the complete subcontractor chain, the necessary reasoning when deciding not to award contracts in lots and to certain obligations in relation to social dumping. Yet Stalzer shares the opinion that in the context of possible corruption, the envisaged amendments will doubtfully have a significant positive effect. Moreover, according to the attorney, the possibility cannot be excluded that prioritising this criterion and requiring minimum weighting of the quality criteria might increase potential corruption considering the fact that price criteria are in generally clear, transparent and, most of all, objective. Quality criteria often contain certain subjective criteria or weightings. Hence both, 'tailor made' quality criteria and 'tailor made evaluations' might be more likely subject to corruption than price criteria. More with this respect also available at: http://www.schoenherr.eu/knowledge/knowledge-detail/austria-fair-procurement-initiative-requires-meat-as-sole-award-criterion-for-construction-cont/ [Accessed 2.6.2015].

67 As noted by Arrowsmith in Arrowsmith, S. (2014). *The law of public and utilities procurement. Vol. 1*. London: Sweet & Maxwell, p. 737.

68 Williams-Elegbe, S. (2012). *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, Studies in International Law, Oxford: Hard Publishing Ltd, p. 30.

'lowest price' criterion presents fewer opportunities for circumventing the law due to being much more specific in application of the criteria; it also takes into account the market values of the respective services, supplies, works. A corrupt practice typical for this criterion is the offer of a low price in the tender and renegotiation of certain conditions only after the contract has been concluded in the absence of any publicity whatsoever.

Another form of infringement, which has also been highlighted as typical for this type of procurement, is related to prior coordination between participants/candidates: the candidate who offered the lowest price is selected as contractor but declines the contract and the contract is then awarded to the next participant in line, who has offered a higher price. As to the 'most economically advantageous tender', as Bovis notes, '[t]he meaning of the most economically advantageous offer includes a series of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, security of supplies. The above is not exhaustive.'[69] Or, in other words, when using the 'most economically advantageous tender', the fantasy of contracting authorities and bidders with corrupt intent will be able to stretch much further. This criterion provides an opportunity for technical parameters and/or requirements to bidders to assume rather exotic proportions and to point towards a certain desirable bidder who can often remain undetectable and invisible for supervisory bodies regardless of the full transparency provided. For this reason corruption in this type of contract award is much more widespread and varied, at least as far as Bulgarian experience shows.

Given the above analysis of the two criteria from the point of view of the corruption opportunities they provide, the legislative decision of the EU by means of the New Procurement Directives will indeed pose a serious challenge to the states suffering from corruption in the sector, including the two countries discussed here.

[69] Bovis, C. (2007). *EU public procurement law*. Cheltenham, UK: Edward Elgar, p. 466.

7. APPEAL

Appealing public procurement decisions in Austria is affected by a significant change in the organisation of the judicial system and more particularly of administrative control bodies. As of 1 January 2014 the former specialised appeal agencies no longer exist.

Prior to 2014 the Austrian Administrative Court acted as the first and ultimate appellate authority against acts of the executive power. Control of administrative acts was carried out within the administration itself by means of challenging the decisions through administrative channels. In accordance with the Austrian Constitution of 1991, however, there were also independent administrative tribunals operating in the different districts (*Unabhängige Verwaltungssenate in den Ländern*). These are jurisdictions with quasi-judicial functions which ruled, at first instance, on the merits of appeals against administrative violations. In addition to those tribunals there were also other independent quasi-judicial institutions or administrative bodies with the status of special jurisdictions which also resolved issues related to contract award (*Bundesvergabeamt*).

After almost two decades of discussions on the issues of administrative enforcement and legislative changes at constitutional level, 2012 saw the adoption of the legislative basis for a fundamental and thorough reform of the Austrian system of administrative enforcement and administrative control.[70] This reform aims to build a comprehensive system of administrative enforcement, the model of which is similar to that applied in Germany. Appeals against administrative acts pursuant to administrative rules are restricted and a unified system of courts of general competence is created for each district, with a Federal Administrative Court (*Bundesverwaltungsgericht*) and Federal Fiscal Court (*Bundesfinanzgericht*) competent to review administrative disputes as courts of first instance. Independent tribunals and special jurisdictions are

[70] The adopted amendment, *Verwaltungsgerichtsbarkeits-Novelle 2012*, entered into force on 1.1.2014. Respectively, a legislative package was promulgated on 14.2.2013, regulating the activity of all administrative courts with the exception of the Federal Fiscal Court. The package regulates the transition to a two-instance administrative process within the period of 2013 to 2014 г. The adopted legislative package also amends several administrative laws in compliance with the reform in administrative jurisdictions commenced in 2012.

discontinued and their functions are transferred to these administrative courts. This is called the '9 + 2' model due to the fact that it comprises 9 administrative courts (one for each district) and two separate ones.[71] In reality the administrative instance is single, but two-tier.[72] The functions of the court on issues related to public procurement are undertaken by the Federal Administrative Court.[73]

> 'The distribution of competencies between the provincial administrative courts and the Federal Administrative Court accords with a constitutional general clause, which regulates these competencies in favour of the provinces. Accordingly, among its other duties, the Federal Administrative Court will review and decide on challenged decisions of the federal public procurement authorities.'[74]

In accordance with the new organisation, almost all decisions issued by administrative courts of first instance may be appealed to the Supreme Administrative Court (which is, in fact, the administrative court that was in operation until 2014). The court of first instance reviews the eligibility of the appeal and its decision may be appealed to the Supreme Administrative Court, which may carry out a wider check on the case and is not restricted

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71 *e.g.*, Grassl, G. (2013). *Austria: Major reform of administrative jurisdiction system takes effect as from 1 January 2014*. [online] Available at: http://www.schoenherr.eu/knowledge/knowledge-detail/austria-major-reform-of-administrative-jurisdiction-system-takes-effect-as-from-1-january-2014/ [Accessed 3.6.2015].

72 In addition to reducing the excessive breaking up of competences between the different special and judicial instances, which existed, among other reasons, because Austria is a federal state, in practice Austria is turning towards an appeal model (similar to that employed by Germany) which Bulgaria has rejected. With the transposition of the Procurement Directives into the PPA in 2006, administrative courts ceased to have competence as a first instance of appeal in public procurement and the CPC undertook these functions in the capacity of a special jurisdiction. It has already been observed in previous chapters that this led to serious disputes as to whether or not this change (although in conformity with the Remedies Directive) is unconstitutional, but ultimately the CPC has remained the first instance of appeal pursuant to PPA, Art. 120.

73 The Federal Fiscal Court has jurisdiction where taxes and duties are enforced by federal fiscal authorities; the Federal Administrative Court is competent for the law enforced directly by the respective federal authorities; all other competences are referred to the Administrative Courts in the *Länder*.

74 Müller, B. Mayr, I. (2013). *Amendment introduces new public procurement review bodies* [online] Available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=ddc59a8e-4514-49ea-a137-7580657fc81c [Accessed 3.6.2015].

by the conclusions contained in the lower court's decision.[75] Despite this, however, such cassation is possible only if the issue is of exceptional legal importance.

The new procedural rules for the administrative courts are based on the existing procedural law applied before the authorities reviewing administrative decisions. Still, the competence of the first instance authority to issue a preliminary decision on the complaint was extended (*i.e.*, *Beschwerdevorentscheidung*).

Decisions of the administrative courts as public procurement review bodies can be challenged before the Supreme Administrative Court. However, this court is not be limited to upholding or reversing the challenged decision; with the jurisdiction reform the Supreme Administrative Court has also been entitled to issue a new decision in lieu of a challenged decision. It will be difficult for bidders in tender proceedings to request a decision from the Supreme Administrative Court - under the new regulation, an appeal to the court is admissible only if the subject of the appeal is an important point of law.

In reality, the main change is that nowadays control authorities have the status of courts and are more unified as institutions. The previous system included the Federal Review Authority (*Bundesvergabeamt*) as the main tribunal for control over public procurements, seven autonomous tribunals in seven of the Austrian districts and two more control senates in Vienna and Salzburg.

The appeal itself does not have an automatic suspensive effect with regard to the procurement, but, upon request by the appellant and at the discretion of the court an interim 'suspension' measure may be implemented. This is also the current solution adopted in Bulgaria. The BVergG[76] provides that the court may, upon request, adopt interim measures and prohibit contract conclusion until it reaches a judgement. In addition, the Austrian legislation has set the stand-still period for

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[75] The cassation instance is competent to repeal the appealed decision of the court of first instance or to reject the appeal.

[76] BVergG, §328.

conclusion of contracts above the threshold at 15 days and for those below the threshold at 7 days.[77]

If any shortcomings within the appeal system for public procurement in Austria need to be highlighted (with view of identifying good practices that can be applied in Bulgaria), these arise from the lack of suspensive effect of the appeal, as is also the case in Bulgaria. In the latter, in order to comply with the Remedies Directive, appeal against the final decision of the contracting authority relating to the choice of contractor may now have a suspensive effect. Upon conclusion of the public contract, the mandatory 14-day standstill period must be observed to make sure that the decision will not be appealed. In all other cases of appeal against actions or inaction of the contracting authority, the PPA does not envisage an automatic suspensive effect.

§328 of the BVergG makes it plain that the view of Austrian legislature is similar to that of the Bulgarian: the appellate authority implements the necessary and suitable interim measures only upon request of the appellant. However, Austrian appellate authorities generally act on such requests and may only refuse an application where the relevant requirements to such application have not been fulfilled. More than 90 % of the applications are accepted.[78] This approach is dramatically different from the Bulgarian situation where not only there is no automatic suspensive effect, but the court allows suspension of the procedure only on very rare occasions.

As already observed, justifications for the completion of a tainted (or allegedly tainted) public procurement procedure quoting economic interest are fundamentally flawed. Legislative solutions in which the appeal suspends performance of the contract (in combination with a speedy and efficient process) are much more sensible and serve as better motivation for contracting authorities to avoid the corrupt practices leading to wrongful contract awards. As was seen in chapter 6, the German legal system in the public procurement sector is a better option for countries with severe corruption problems such as Bulgaria than the Austrian

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[77] BVergG, §132.

[78] See *e.g.*, *Report of the Bundesvergabeamt 2012* (2012). [*Bundesvergabeamt Tätigkeitsbericht 2012*], p. 17 *et seq*.

system. Under German law, the appeal, as a general rule, has suspensive effect. Of course, such a legislative decision would be denounced as causing delays in dynamic market relationships and running counter to the needs of contracting authorities, but if the other, much more burdensome imperative rules are removed, the Bulgarian award process could well afford to wait for the result of an appeal against decisions of the contracting authority at each phase of the procedure where suspicions of infringements exist. Such an approach would definitely have a disciplining and preventive effect on the contracting authority itself, which would inevitably be forced to increase the quality of its *ex ante* control exercised during preparation of the document package for each procurement procedure. Where there is a reciprocal and adequate legislative reaction to each action or inaction, then, inevitably, a large portion of the attempts to bribe the Bulgarian contracting authority as early as the choice of procedure and object selection stages would be thwarted. Still, the Austrian model does demonstrate positive effects due to the fact that the court practically always allows suspension of the procedures, once requested. However, in the case of Bulgaria this approach would require more far-reaching legislative and case-law changes in order to achieve the necessary disciplining influence on participants in the procurement process.

When comparing the appeal process in the two countries, the scope of appeal should also be taken into account. The Bulgarian model is more similar to the German one, allowing, in practice, appeal against each action or inaction of the contracting authority.[79] The Austrian solution is somewhat different[80] - the BVergG explicitly lists[81] those decisions that can be appealed independently and those which can only be appealed together with the ones listed for independent appeal. On a similar note, with view to preventing corruption in public procurement in Bulgaria, the Bulgarian award system must rest on much more rigorous restrictions and active administration of the law, which would 'dampen' the desire to manipulate public procurements; thus the Austrian model cannot be

[79] PPA, Art. 120.

[80] See *inter alia* Gast, G. (2002). *Das Österreichische Vergaberecht*, Vienna:WUV, Universitätsverlag, p. 120 *et seq*.

[81] BvergG, §2Z(16), lit. a.

recommended as a good example for Bulgaria. With regard to the scope of appeal, the Bulgarian legislator has definitely provided wider opportunities for protection of participants,[82] having explicitly set out in the PPA that:

> 'Appealability according to the procedure established by this Chapter shall apply to any decision by the contracting authorities under a procedure for: 1. the award of a public procurement, including through application of a framework agreement, a dynamic purchasing system or a qualification system; 2. conclusion of a framework agreement; 3. setting up a dynamic purchasing system or establishment of a qualification system; 4. a design contest.'[83]

The observation that these wide legal opportunities need to be supported by a fast-acting judicial apparatus, timely decisions of both instances and reliable expert capacity, is an altogether different issue. Precisely these elements of a well-functioning appeal and control system regarding decisions of contracting authorities are in place in Austria, as will be discussed below. In the presence of these elements, the detection of corrupt schemes concealed behind discriminatory criteria or tailor-made notices will be much more reliable and the anti-corruption policy becomes meaningful. Currently the very opposite situation can be observed in Bulgaria – the law is liberal with regards to the scope of appeal, but the first and second (first judicial) instances have the capacity to only detect infringements that are strictly legislative (and procedural) in nature with not much left over for in-depth control of procurement in order to detect whether these infringements are deliberate or not.

Despite the fact that the administrative legal system in Bulgaria is generally different from the Austrian one, there are certain similarities which, in turn, give rise to similar problems. In both countries there is a large number of different (including special) jurisdictions, the decisions of which are subject to control by a single supreme administrative court. This concentration of competence determines the huge load on the supreme

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[82] See Krivachka, M. (2006). *Certain Specifics in the Appeal of Decisions of Contracting Authorities pursuant to the Public Procurement Act,* Sofia: Pazar i Pravo, Issue 10/2006.

[83] PPA, Art. 120(1).

administrative jurisdictions in both countries. In this connection, the *technical and organisational measures* to regulate the work load of the Administrative court in Austria could usefully be applied in Bulgaria as well.

The reform in administrative enforcement in Austria by transforming the special jurisdictions into a Federal Financial Court and Federal Administrative Court will help to redistribute the load, to differentiate competences and to set apart the Supreme Administrative Court as a court of second instance in administrative disputes. A *better organised court structure* (first and second instance) could have a significant effect on the speed and efficiency of operation. This could restore the motivation of bidders and contractors in public procurements to appeal the acts of contracting authorities. More particularly, if such improved organisation of the CPC and SAC in Bulgaria could result in more definitive protection of the rights of participants in the procedures and more frequent interaction between appeal instances and the prosecutor's office, corruption prevention would take on an entirely new meaning. Currently, regardless of the efforts in this direction, public procurement is identified as 'an important risk area for corruption. […] [T]he limited administrative capacity in many parts of the public administration due to a lack of sufficient qualified staff and experts, high staff turnover and a lack of supporting structures for smaller contracting authorities [*can be highlighted as a serious problem in the country*].[84] Important delays in the treatment of appeals related to public procurement also appear to follow from limited capacity in the judicial system.'[85]

Another important point in the comparison between Austrian and Bulgarian judicial control systems is the comparative (financial) *independence* of Austrian courts following the reforms. If this could be achieved in Bulgaria, then the impartiality and transparency in the monitoring of bodies entrusted with control of the legality of actions of the executive power would be questioned much less often; their effectiveness,

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[84] The note has been added to the quote.

[85] *Bulgaria: Technical Report*. (2014). Accompanying the document *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification mechanism*, Commission Staff Working Document Brussels, SWD(2014) 36 final.

once again, would be decisive for the elimination of corruption in public spending. As to the independence of the judicial system and of administrative and government bodies, any positive comparisons remain in the realm of wishful thinking, because even the most well-meaning legislative imagination, eager to incorporate the good practices of other countries could not overcome the *status quo* in the absence of conscious and purposeful political will. In this context, it is a well-known fact that

> 'A judiciary that is not independent can easily be corrupted or co-opted by interests other than those of applying the law in a fair and impartial manner.'[86]

As has been shown the preceding chapters, Bulgaria requires much more rigorous restrictive and sanctioning rules for the award of public contracts in order to combat the widespread corruption and improper spending of public funds in a not particularly economically stable country. These rules need to be supported by frequent and timely implementation, particularly on behalf of instances which are independent of politics and business circles. Only when these elements operate simultaneously can the good examples identified in the course of this analysis or other similar works give a positive result.

The introduction of an *electronic document exchange system* in the administrative procurement process and the introduction of computerized finances and human resources management systems may be expected to improve matters. The introduction of the so-called 'e-justice' in Bulgaria requires a massive amount of funds but is, beyond doubt, yet another cornerstone in the streamlining of the public procurement appeal process which can ensure speed, impartiality and publicity.

As is evident from Austria's example, the use of different types of software would be decisively useful not only for faster allocation and review of administrative proceedings against ongoing or finalized procurement procedures, but also for the creation of control, internal

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[86] As stated by Gabriela Knaul, the United Nations Special Rapporteur on the independence of judges and lawyers, in the presentation of her annual report to the UN General Assembly, New York, 24.10.2012. Ohchr.org, (2012). [online] Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12692&LangID=E [Accessed 3.6.2015].

monitoring and activity assessment systems for the courts (*e.g.*, delayed cases, statistics of the number of reviewed cases and those finalized by means of an effective sentence; detected corruption cases *etc*.). At present this is highly necessary for the Bulgarian judiciary in general, not just with regards to procurement. The expected effect from the implementation of these practices would be optimisation of time limits for case review by administrative courts, improved efficiency and increased transparency of court activity.

8. CORRUPTION MANIFESTATIONS. CORRUPTION LEVELS. PREVENTION

As mentioned above, over the last years Austria has been frequently mentioned as a state having problems with corruption control, while some overly zealous critics describe the country as a 'corruption paradise.'[87] Several serious scandals exploded in the field of public procurement and public private partnership in Austria,[88] which, ultimately, had an effect on social perception of corruption and consequently resulted in a lowered CPI ranking for Austria, which lags behind other large economically developed countries (including Germany) by some 10—12 points.

In its recent efforts to restore its image of a country in which business is not characterized by corruption, Austria has proposed and already implemented several anti-corruption measures. Most of these are not specifically or purposefully related to public procurement, but where the anti-corruption policy is relevant for the purpose of this study, it is discussed below.

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[87] Pulito, A. (2013). *Austria: The Alpine corruption paradise*, [online] Academia.edu. Available at: https://www.academia.edu/2432598/Austria_-_the_Alpine_corruption_paradise [Accessed 3.6.2015].

[88] See *supra* note 10.

8.1. CORRUPTION PREVENTION LEGISLATION

Austria has ratified most existing international agreements and conventions regulating the fight against corruption including the Council of Europe's Criminal Law Convention on Corruption[89] and the Additional protocol[90] thereto. Austria is also a State Party to the OECD Convention (with a reservation for facilitation payments). Austria is a member of the Group of States against Corruption (GRECO) of the Council of Europe and has a leading role in the International Anti-Corruption Academy (IACA).

Over the last few years, Austria has introduced several amendments in its national legislation and in particular the Criminal Code (*Strafgesetzbuch*, SGB)[91] under pressure from the EU precisely with the purpose of covering almost all possible types of corrupt behaviour. These changes, however, refer mainly to the 'providing of advantages' to employees and not specifically to public procurement. Measures against money laundering, lobbying and limiting funding of political parties were expanded in 2012 and 2013.[92] The SGB criminalizes, in general, attempted corruption, bribery (active, passive, of foreign officials *etc*.), extortion, fraud, embezzlement and money laundering.[93] Of course, in accordance with European legislation, all manifestations of active and passive corruption and the offering of gifts to officials are explicitly listed in the BVergG as grounds for exclusion of participants from a public procurement procedure[94] (a final court judgement is not necessary for exclusion). These exclusion grounds are mandatory and the affected companies are excluded from taking part in procurement, irrespective of

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89 Strasbourg, 27.1.1999, CETS 173.

90 Strasbourg, 15.5.2003, CETS 191.

91 Promulgated 13.11.1998, BGBl. I S. 3322, as amended.

92 The US Department of State 2012 notes that the law provides access to government information and these laws have generally been respected in practice.

93 *E.g.*, SGB, §133, §146, §147, §148, §153, §165 *etc*.

94 In particular, SGB, §153, §153a, §1536, §302 and §307 are among the exclusion criteria in BvergG, §68 and §229.

whether they intend to participate as bidder, subcontractor, or jointly with other bidders (even if the latter are reliable).

At a purely legislative level, no other measures aimed specifically against corruption in contract awards (except for exclusion and possible blacklisting) can readily be pinpointed. As reported in the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Austria,[95] blacklisted companies are not necessarily excluded from participating in future bids.

The Bulgarian solution, as set out in the PPA, regards lists with undesirable contractors as a necessity but the truth is that they do not in any way assist in the choice of contractor, nor is there any clear option for rehabilitation of the respective bidder. It is impossible to say which approach is better because there is no practical evidence that would indicate positive results or a reduction in corruption. Furthermore, the new Directive 24/2014/EU expands, on one hand, the grounds for exclusion of participants[96], but creates, on the other hand, a rather liberal solution - the mechanism of 'self-cleaning' by allowing the bidder to provide the contracting authorities with sufficient evidence to rehabilitate itself and permit its continued participation in the procedure.[97] Unlike in Bulgaria, the 'self-cleaning' mechanism has been familiar to and used in Austria (and in Germany) long before the new procurement package was implemented. Both of the latter countries have managed to demonstrate the logic behind this mechanism, as it does not pose an obstacle to the fight against corruption and does not detract from the main aim of the preconditions for exclusion of participants under Article 45(1) of Directive 2004/18/EC; it has, at the same time, assisted in increasing competition.[98] As Arrowsmith, Prieß and Friton maintain by the observation of the Austrian and German experience in self-cleaning:

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95 *Phase 3 Report on Implementing the OECD Anti-bribery Convention in Austria.* (2012). [online] Available at: http://www.oecd.org/daf/anti-bribery/Austriaphase3reportEN.pdf [Accessed 3.6.2015], pp. 47 and 48.

96 *E.g.* offering the option for blacklisting and exclusion of economic operators that have shown persistent deficiencies in performing procurement contracts in the past.

97 Directive 24/2014/EU, Art. 57(6).

98 When a participant is able to prove that there are no longer any grounds for its exclusion, the participant once again is deemed equal to other participants and acts to increase the number of competitors for the relevant procurement.

> 'Although exclusions are suitable means for achieving the objectives of the mandatory exclusions in the procurement directives[99] it is submitted, however, that exclusion is not *always necessary* to achieve these objectives. A less severe method, short of an absolute exclusion, is to take into account, in certain individual cases, self-cleaning measures which the affected company has taken. Further, […], the accomplishment of a complete self-cleaning can often, in fact, *positively support* the objectives of the mandatory exclusions provisions'.[100]

Whether this mechanism will have a positive effect on the fight against corruption in the field in Bulgaria it is still too early and too debatable to judge. Years of practice in the award of public procurement in Bulgaria reveal that when a certain element of the procedure is left to the discretion of the contracting authority (or the members of the tender assessment committee), and when a way to circumvent the main and more severe rule exists, the door to corruption remains wide open. Given that the contracting authority may be convinced, by means of sufficient evidence, that a certain bidder need not be excluded (in the absence of a clear definition of the term 'sufficient evidence'), scepticism as to the motives of the contracting authority to accept the evidence provided as sufficient is perfectly justified. It has been repeatedly noted in the course of this study, given the specific characteristics of the Bulgarian model, restrictive measures are a much more adequate beginning to an effective fight against poorly detected and sanctioned corruption. Only practice, however, will reveal whether the 'self-cleaning' mechanism will contribute to an increase or decrease in corruption in Bulgarian awards.

The new model discussed above demonstrates again the ineffectiveness of the overrated transparency rule in Bulgaria. In the case of 'blacklists' it serves merely to expose and condemn but does not actually prevent corruption. In the Austrian model, where blacklisting is applied, this has a profoundly negative effect on the business of the

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[99] *i.e.*, The Procurement Directive.

[100] Arrowsmith, S., Prieß, H. and Friton, P. (2009). Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Procurement Law?, *Public Procurement Law Review*, Issue 6, p. 276.

respective undertaking. The importance of the cultural perceptions of corruption should not be underestimated.

In the absence of distinctive features in the rules of the fight against corruption in public contracts, it is clear that up until a little over a decade ago the issue of corruption and its manifestation was virtually insulting to Austrian legal writers and lawyers. Fabrizy[101] states that

> 'Corruption is not an issue of policy in Austria today and had not been in the years before […]. Corruption is not mentioned in the latest report of national security […] even not in connection with organised crime […]. There is also no public discussion about corruption going on […]. Corruption is really a minor problem in Austria […] corruption rather happens in the field of public procurement, especially in construction.'[102]

Obviously corruption in public contracts did exist even then, but the fact that comments on corruption in Austria have swung from one extreme to the other extreme (from 'not an issue in Austria' to 'a corruption paradise in EU') within a relatively brief period of time cannot be ignored. Probably due to the corruption cases revealed at high political levels over the last few years and the sharp drop in the CPI ranking, Austria has focused on the development of strategies, policies and legislative changes (including being one of the initiators of IACA). The distinct features of the problem in the field of public procurement seem to have become diluted in the general picture and anything specific is in most cases hard to identify.

Despite the above, the absence of specific measures aimed at public procurement does not mean the absence of measures in the case of proven corruption in the award of public procurement. In addition to the mandatory exclusion from further participation in public procurement, corruption detected in the award process may be deemed a constituent element of an SGB infringement and may result in significant sanctions

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[101] Fabrizy, E.F. in Beken, T., Ruyver, B., Siron, N. (2001). *The organisation of the fight against corruption in the Member States and candidate countries in the EU*. Antwerpen/Apeldoorn: Maklu, pp. 35–48. Fabrizy was then the Deputy Chief Advocate General at the Supreme Court in Vienna, later becoming Chief.

[102] *Ibid*, p. 35.

(including deprivation of liberty). As noted below in connection with the functions of the various bodies investigating corruption in public procurement, if a specific contract is deemed to restrict competition (which also covers certain types of bid rigging) in the sector concerned, or if fraud or bribery have been detected, then these offences automatically entail a breach of criminal law.[103]

Of course, criminal provisions differentiate between corruption in the public and the private sector in terms of the punishment imposed, but nevertheless, the SGB, sanctions *inter alia* the acceptance by or the offer of benefits to contracting authority employees for the purpose of winning a contract or obtaining data from a competitor's bid (subject to monitoring by control bodies), when the act restricts competition in the award process.[104]

Jaros and Stalzer[105] note the presence of a 'legal chain reaction' of corruptive behaviour in public procurement procedures, which may result, not only in restrictions of a penal nature, but also means that

> '[A]ny such legally binding judgment or substantial evidence for a respective offence constitutes a very high risk for the company being – at least temporary – 'blacklisted' in public procurement procedures. [T]he potential risk of being temporally excluded from public procurement procedures may have a substantial negative effect on the company's future business and turnover (depending on the company's business sector and clients)'.[106]

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[103] Particularly SGB, §168b & §146. Offences under §168b can be penalized with a maximum imprisonment of three years, and under §146 and bribery with up to ten years imprisonment.

[104] SeeSGB, §331 *et seq*.

[105] Jaros, K., Stalzer, J. (2014). *Austria: Corruptive behaviour in public procurement procedures as a deal breaker for mergers and acquisitions transactions?*, [online] Available at: http://www.schoenherr.eu/knowledge/knowledge-detail/austria-corruptive-behavior-in-public-procurement-procedures-as-a-deal-breaker-for-mergers-and-acqu/ [Accessed 3.6.2015].

[106] *Ibid*.

8.2. RESPONSIBLE BODIES

Action against corruption in Austria is undertaken primarily by the centralized body – the Federal Bureau of Anti-Corruption (*Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung*, BAK), an institution of the Federal Ministry of the Interior. Between 2001 and 2010, an active body in Austria was the Federal Bureau for Internal Security, in the capacity of the main anti-corruption body exerting police oversight, but, following changes in legislation (dictated, in part, precisely by the corruption scandals during the same period), the BAK took over these functions, concentrating specifically on corruption and enjoying significantly wider powers. The BAK has nationwide jurisdiction in preventing and combating, investigating and fighting corruption and any related economic offences perpetrated by state administration officials and employees in undertakings with state participation, and in the private sector as well. The BAK cooperates closely with the second main anti-corruption body in Austria – the Central Prosecutor's Office for Economic Crimes and Corruption Cases (*Zentralen Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption*) and with different international anti-corruption institutions.

BAK's activities are concentrated in 4 main areas:[107] (i) prevention, through analysis of corruption models and elaboration of preventive measures in cooperation with criminal police and other institutions; (ii) law enforcement, through police investigations into corruption and related criminal offences in the public and private sector; (iii) education, through information exchange and development of training programmes aimed at increasing the competences of employees throughout the state administration; (iv) cooperation with other national, European and international institutions in the field of anti-corruption, as well as the exchange of good practices.

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[107] See Bak.gv.at, (2015). *Federal Bureau of Anti-Corruption - General Information*. [online] Available at: http://www.bak.gv.at/cms/BAK_en/general/start.aspx [Accessed 3.6.2015]. Further information also in Hensgen, L. (2013). *Fight against corruption in the Danube region: A study of regional best practices*, Max Planck Foundation for International Peace and the Rule of Law, Sankt Augustin: Konrad Adenauer Stiftung, p. 57.

One of the main instruments employed by the BAK in developing prevention projects is the analysis of previous cases and investigations. The focus of analysis is not only on statistical data and initiated/completed investigations, but also on an in-depth review of individual cases of complex or specific acts of corruption, organised and systematic behaviour of individuals and undertakings.

> 'The aim is to identify the different structures and mechanisms which support the manifestation of corruption. This approach investigates certain details related to the circumstances which have led to detection of the crime, specific operational aspects, as well as the outcome of any subsequent legal or disciplinary proceedings. […] This data is then assessed against selected parameters in order to detect similar models and specific features in the profiles of suspects and the models of corruption exhibited.'[108]

One of the main reasons for the overhaul of the former Federal Bureau of Internal Affairs, in addition to the acts of bribery established among high-ranking officials in the Austrian police and other institutions, was the desire of the state to create a body which would enjoy a significantly higher level of independence from politics, and which would be able to perform its duties towards detection and prevention of corruption free of any external pressure.[109] The BAK was created on the basis of a Federal Law on the Establishment and Organisation of the Federal Bureau of Anti-Corruption (*Bundesgesetz über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptionsbekämpfung*, BAKG)[110] which expressly provides that the Bureau will be an independent institution outside the scope of the Directorate General for Public Security, although subordinate to the Austrian Ministry of the Interior.

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[108] Dzhekova, R., Gunev, F., Bezlov, T. (2013). *European Experience in the Fight against Police Corruption*, Sofia: Center for the Study of Democracy, p. 93.

[109] Which is connected to certain criticism of Austria on behalf of GRECO.

[110] BGBl I No. 72/2009

In addition, the BAK's functions and tasks are clearly cut out. It has full authority to perform (police) investigations of criminal offences under the Criminal code (among other instruments) relating to agreements restricting competition in procurement procedures as well as serious fraud and commercial fraud on the basis of such agreements. It enjoys extensive rights and employs numerous methods for investigation of corruption cases involving all state administration officials, employees of undertakings with state participation and, in specific cases, entities from the private sector. The BAK is in close and constant cooperation with the Prosecutor's Office, acting explicitly on the basis of signals provided by the latter, while, on the other hand, police authorities are obliged to report to the BAK any cases of suspected corruption. This serves to create excellent interaction between law enforcement bodies and the judiciary while at the same time the fight against corruption remains a separate and independent action unit (over which oversight is exercised separately by a special committee). Last but not least, the BAK is the body for cooperation with international institutions performing corruption investigations, such as OLAF and INTERPOL.

A comparison with the Bulgarian model reveals several differences:

Firstly, similar centralised, anti-corruption activities in Bulgaria are carried out by the CPCCOC and the BORKOR project, but the initial institutional characteristics and projects in the field of public procurement were unable to evolve fully, due to the unstable situation in the country and the rapid succession of governments over the last couple of years. The fate of BORKOR remains unclear for the time being due to the project's links with the political aspirations of Bulgarian politicians and the significant resources required for its implementation (including resources for implementation of the Solution Model, reviewed in chapter 4). There is an evident lack of political will, and, perhaps, of suitable public perception for the CPCCOC to continue adequately its role as a centralized anti-corruption body and for comprehensive implementation of the BORKOR project.

Secondly, even if the CPCCOC were to commence proper operation, its functions, at least for now, only cursorily cover the 4-pillar approach to work adopted by the Austrian BAK. The analysis of corruption models is, indeed, strongly represented in the Solution Model in the BORKOR

project, simply because the project itself has been successfully borrowed from Germany's experience. Under the remaining three pillars, however, Bulgaria has done almost no work whatsoever. Police investigations of corruption are a rare occurrence, while in the field of public procurement it will be difficult to identify even a handful of such investigations.[111]

Another important difference which cannot be ignored is the principle and pursuit of independence of institutions investigating corruption cases that applies in Austria. This underlies the legislative changes and the expanded powers of institutions such as BAK and the Central Prosecutor's Office, which will be discussed further below. In reality, the very opposite is evident in Bulgaria – the NAO is a relatively independent body, albeit with rather limited powers (due to the many legislative changes in the last years), which controls public procurement in Bulgaria. Yet, given the enormous political interests concentrated around the NAO, its fate has been largely uncertain in recent years, with each new government attempting to lay its hands on, and influence the choice of its members and mandates, thus limiting its independence (as was discussed in chapter 3 of this work).

It should be also noted that training of the Bulgarian administration for timely recognition of corruption, reaction in cases of attempted bribery *etc.*, is insufficient, or, where in place, is definitely not a priority. Particularly in the field of public procurement, such training, along with well-functioning whistleblowing systems with guaranteed anonymity could have a decided effect on the detection of corruption involving public procurement participants.

As discussed, the judiciary body working in closest cooperation with the BAK is the Public Prosecutor's Office for White-Collar Crime and Corruption (*Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption*, the WKStA). The functions of the WKStA are similar to those of the BAK with the two bodies working in close cooperation and complementing each other. The WKStA is part of the Public Prosecutor's Office and investigates corruption, bribery,

[111] No claims are made as to comprehensive examination of the frequency of this type of investigation and its results because police investigations remain outside the context and objectives of this analysis.

financial crimes, fraud, as well as anti-competition agreements. Prosecutors have the power to initiate and terminate investigations and proceedings. The offences are generally of a high public and/or material interest, as well as financial crimes. Public procurements also fall in this scope, as a separate control and prevention item. The WKStA proposes to increase the number of experts employed, and the state allocates, both to the WKStA and to the BAK, significant resources in support of their functions.

As previously mentioned, the BAK does not conduct own-initiative investigations, but acts upon delegation by the WKStA or another prosecutor's office or court. Following receipt of the signal and its preliminary assessment, the BAK, in cooperation with the WKStA determines whether the case should be investigated by the BAK or another qualified body (usually the Federal police), if the BAK has no available capacity to carry out the investigation at the relevant time. Thus the BAK acts as an intermediary between the prosecution and the police in launching anti-corruption measures.

In addition to these two bodies, acting as the main anti-corruption units with general and more specific functions in the field of public procurement, there are also several other relevant organisations such as (i) the Coordinating Body on Combating Corruption (whose role is to coordinate anti-corruption measures and whose members include Members of Parliament, BAK, the Chamber of Commerce and other governmental authorities and private sector representatives; (ii) the Department for Economic and Financial Crime; (iii) the Austrian Financial Intelligence Unit - A-FIU (focused on suspicious transactions within the banking sector); (iv) the Audit Office (*Rechnungshof*, AO),[112] and (v) the Austrian Ombudsman Board.

With respect to the AO, despite the fact that its primary function is to control the financial conduct of the procedures 'it is possible in this context to compare, whether the conclusion of public contracts that replace rulings (and hence avoid the costs of possible objections against these

[112] Together with the respective regional audit offices.

rulings) is financially advantageous.'[113] The AO is also a good example of an audit office which carries out external audits and is empowered to make recommendations for improvement of the procurement process.[114] Once again, as in Germany, the opportunity emerges for the AO to act by carrying control over proper spending of public funds. In addition, the AO, like the BAK and the WKStA is also independent and is able to provide objective and impartial monitoring of the financial part of the procedure – an element which the Bulgarian NAO most certainly lacks, as already noted. The functions and authority of the AO serve as additional proof of the absolutely imperative synergy which must exist between the legal framework and the control and administrative apparatus. In the absence thereof, all existing rules (even those aimed at achieving transparency and/or strengthening anti-corruption policies) lose their meaning. The AO in Austria does not suffer constant legal changes and its stability and clear functions leave no doubt as to the importance of an active, independent body exercising control over public spending. However, the AO has no sanctioning tools, but is only an advisory body, which, as already observed, would certainly not suit the Bulgarian model, which urgently needs more active sanctioning mechanisms, if it is to deal with corruption in the sector.

A review of the functions, actions and tasks of the main bodies engaged in the fight against corruption in Austria leads to several important conclusions when these are compared to Bulgaria:

(1) The good practices which could be adopted with view of the organisational structure of Austrian authorities are related mainly to the strong trend for independence of these bodies from the government as well as the adequate coordination between police forces and the prosecution, united both in the investigation and in the prevention of corruption;
(2) The functions of all bodies are strictly defined and focus on timely and proper control over procurement implementation – from both a legal and a financial standpoint, with these bodies also being actively involved in the improvement of the awarding process. There is no

[113] See *supra* note 37, p. 398.

[114] See *Integrity in Public Procurement: Good Practices from A to Z.* (2007), OECD Publishing, p. 95.

room for (mis)interpretation or duplicate work, as observed in Bulgaria (*e.g.*, the functions of NAO and the PFIA or the strict procedural control, maintained by the CPC and the SAC).

(3) Specifically for public procurement, the approach of criminalising restriction of competition in the sector is very interesting, as is the focus on cases of bid rigging. This is in full compliance with the ideas in the New Procurement Directives. Bid rigging is an issue which has been highlighted in the last years in Bulgaria as well, due to the clear conclusion that such practices not only distort or restrict competition, but also create corruption possibilities (on a horizontal line between the participants in a procurement process). Thus, the Austrian experience could be a valuable example of positive practice for the Bulgarian CPC against this phenomenon.

Given the new rules set out by Directive 24/2014/EU, the functions of the BAK and the WKStA are expected to increase, along with criminalisation of the other grounds contained in the Directive requiring the exclusion of a bidder.[115] However, making allowance for the fact that the organisational and structural changes made to these anti-corruption bodies are rather new, what is also important is that their activities show 'a serious will to effectively fight against corruption'.[116]

8.3. OTHER ANTI-CORRUPTION EFFORTS IN THE AWARD OF PUBLIC PROCUREMENT

Some of the private and non-governmental initiatives in the combat against corruption in the field of public spending are briefly analysed below, especially those which demonstrate good practice and should be adopted in Bulgaria as well. Once again, these do not differ significantly

[115] According to Directive 24/2014/EU, Art. 57 the main exclusion grounds are: participation in a criminal organisation, corruption, fraud, terrorist offences, money laundering, child labour and trafficking.

[116] Hensgen, L. (2013). *Fight against corruption in the Danube region: A study of regional best practices*, Max Planck Foundation for International Peace and the Rule of Law, Sankt Augustin: Konrad Adenauer Stiftung, p.63. This can be also recognised by the number of recent procedures and activities of the WKStA in relation to bid rigging and public procurement procedures.

from the conclusions drawn from the comparison between Bulgaria and Germany.

The *development of the whistleblowing mechanisms* available in Austria and the encouragement of citizens to make use of them are both very important. Whistleblowing Austria is the local branch of the Whistleblowing International Network (WIN). It provides whistle-blowers with assistance and advice. According to its website, it works on promoting the idea of whistleblowing within Austrian society.

Developing e-Governance is also a priority for Austria, as is the case in Germany and most Member States. The main portals in Austria are Digital Austria and USP.gv.at, which offer online administrative services to citizens and companies. This results in significant reduction in the time necessary for obtaining all sorts of permits and certificates required in the course of participation in public tenders. 'Across Europe, Austria is the leading country regarding the implementation of eGovernment'.[117]

Austrians also definitely recognise *the development of e-procurement* as an 'effective tool to fight corruption', which ensures 'reliable audit trial for the process of promoting, issuing, clarifying, evaluating, and awarding tenders'[118] and anticipate the transposition of the New Procurement Directives which will provide an additional stimulus in this direction. E-procurement is getting more and more popular in Austria. Many contracting authorities have already implemented e-procurement systems.[119] Yet there are no clear standards as to the software requirements and there are a number of different providers of e-procurement systems and tools. Most of the small and medium sized purchasers, however, do not yet have the necessary resources and there will be a huge demand as a result of the transposition of the New Procurement Directives.

As is by now well-known, the development and broad use of all types of electronic systems and portals aimed to facilitate the award process and

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[117] Humann, P. (n/a) '*eTendering in Austria*', [online] Available at: http://www.ippa.org/IPPC4/Proceedings/05e-Procurement/Paper5-6.pdf [Accessed 3.6.2015].

[118] Stalzer, J., (2014). *Changes and opportunities of e-Procurement*. Roadmap 15, (2014). [online] Available at: http://roadmap2015.schoenherr.eu/challenges-opportunities-e-procurement/ [Accessed 3.6.2015].

[119] Such as ÖBB, Asfinag, BBG *etc*.

to reduce bureaucracy is one of the main instruments in the fight against corruption in the procurement field. Given the historical background and corruption traditions in Bulgaria, reviewed in the first few chapters of this work, all attempts to limit the human factor in the award process can be regarded as extremely well-targeted. The practice of Austria is a positive example. The expected introduction of e-Certis, in accordance with the New Procurement Directives, and the strengthening of the role of e-procurement as promoted by these acts are additional positive steps.

In Bulgaria, e-procurement is not expected to be a reality earlier than 2020, which is a significant delay: implementation of the main portion of the New Procurement Directives is required by April 2016, and the remaining e-procurement requirements need to be adopted by 2018. It may be that pressure from the EU in its periodic reports might result in faster introduction of e-procurement and electronic data collection and the uploading of certain platforms. The latest amendments to the PPA in Bulgaria have already provided for some e-platforms such as e-monitoring, e-Audit, e-Catalog (in line with the proposals made as part of the Solution Model). However, their operation and use in practice are still at a standstill and there are many more investments and purely technical revisions required before these e-platforms can be truly operable. And while waiting out for these 'childhood diseases' to pass, the haste of the legislator will most probably remain unjustified and the actual benefits of the platforms will probably only be observable much later that hoped.

One element in the New Procurement Directives is *the introduction of the Single Procurement Document*, which involves self-declaration as means of proof that the economic operator fulfils the relevant selection criteria; this already exists in Austria, having been introduced in law.[120] In addition to ensuring considerable savings,[121] this instrument significantly reduces the administrative burden in the award procedure. This should

[120] See Federal Law BGBl. I Nr. 15/2010.

[121] 'The savings following the introduction of the system of self-declaration were estimated at 12.3 Million Euros. Further savings of 3.2 Million Euros were estimated due to an extension of the system of self-declaration in 2012 (see Federal Law BGBl. I Nr. 10/2012)' - *High Level Group on Administrative Burdens*, Case Study on ABR plus Item No. 5 Public Procurement, [online] Available at: http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/141007_abrplus_case_study_no_5_public_procurement_final_en.pdf [Accessed 3.6.2015], p. 15.

play a role in anti-corruption policies as well, by providing not only a lighter regime of proof which does not leave any opportunities for getting round the selection criteria; it should also distribute the responsibility for contractor selection between the participant and the contracting authority with the participant bearing the risk of any incorrect data.

9. WHAT DOES THE COMPARATIVE ANALYSIS WITH AUSTRIA REVEAL AND WHAT GOOD PRACTICES CAN BE ADOPTED IN BULGARIA?

The parallel drawn in the field of procurement awards and implementation in Austria is of great significance for the present analysis because both countries currently face difficulties in managing corruption models and their prevention.

Although in a very different social and economic context, and with a different CPI (unsatisfactory when compared to other Member States but significantly better than that of Bulgaria), Austria appears to have serious problems with regards to limiting corruption both among high-ranking officials and more specifically in public spending (these two aspects are often inextricably linked). The corruption scandals of the last few years have toppled Austria from its pedestal of a remarkably stable and upright business partner, and the criticism in EU reports now sounds close to that contained in the reports addressed to Bulgaria.

This is the central point for the comparison of these two countries facing similar issues: How does Austria react to the attacks that it has become a 'corruption paradise'? What statutory and structural changes has it introduced in order to escape this *status quo*?

The analysis of the legislation and procurement award systems of the two countries clearly reveals the differences in their approach and also the attitude towards transparency rules as an anti-corruption instrument, which is the primary objective of this study. Clearly, as opposed to the Bulgarian model, in its desire to change the current situation, Austria has embraced yet stricter legislative bodies, a yet better-oiled policing-prosecution apparatus resulting in a large number of detected and prosecuted cases and effective sentences ('Austria is among the best-rated countries for the

deterrent effects of successful prosecutions in corruption cases, according to the 2013 Eurobarometer.')[122]

Yet, even though there are similarities, in terms of legislation, between Bulgaria and Austria, the reforms launched by Austria differ significantly from the Bulgarian ones. While the Bulgarian PPA has suffered countless transformations, the designated Austrian law has undergone only a few small-scale amendments for the last five years[123] but has reorganised its bodies and the BBG in order to meet the needs of contracting authorities and contractors for independent control bodies; a two-instance swift-acting, independent judicial system and a Public Procurement Agency, the BBG. The latter also acts as the main central purchaser and provides an example with its tailor-made strategy for combating corruption and its code of conduct observed by all employees.

The practical experience of the above bodies is still not sufficiently long (considering the period after their reform and reorganisation) and their functions and responsibilities are expected to be further expanded to give effect to the New Procurement Directives. But even in their current *modus operandi*, they demonstrate a positive change and focused fight against corruption – in practice, and not only on paper.

The legislative framework in the field of public procurement in Austria is not overly specific in terms of anti-corruption instruments created specifically for this sector, but the increased control and broadened powers of the institutions are evidently able to achieve the desired effect. The BVergG provides the main instruments to fight corruption as presented in the Procurement Directives. Some rules do mirror the Bulgarian approach as well, but this is again due to the harmonised EU legislation and/or the historical similarities, as discussed above, and not due to a specific approach of domestic legislators.

As a summary of the main findings, the investigation into Austria's award system shows two main differences between the Austrian and

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[122] *First EU Anti-Corruption Report*. (2014), Brussels, COM(2014) 38 final, Annex 20 – Austria, p. 5.

[123] Most of the legislative amendments in Austria were made with the aim of increasing flexibility and decreasing the burden of the procedure. However, Austrian procurement legislation is not as burdensome and complicated as the legal framework in Bulgaria, even before the amendments in BVergG were adopted.

Bulgarian approaches towards resolution of an equally grave problem – corruption in public resource allocation:

(i) Transparency rules are *not* present as an endless bibliographic list reproduced into Austrian legislation as is the case in Bulgaria in the last few years – on the contrary, transparency is achieved by means of a well-functioning administrative machine, strengthening of e-procurement and working control and appellate apparatus.

(ii) Trust in Austria's law enforcement system and its constant refinement and efficient actions with the aim of speedy exposure of corruption cases puts a wide berth between the starting points in the fight against corruption in public contracts in the two countries.

Once again, as with the comparison with Germany, it is clear that well-functioning control bodies along with a strong trend for limiting the human factor in procurement award is the proper approach to preventing and combating corruption in the procurement sector. This conclusion is equally valid both for the current legal systems and following transposition of the New Procurement Directives.

CONCLUSIONS

'For the one who sows to his own flesh
will from the flesh reap *corruption*,
but the one who sows to the Spirit
will from the Spirit reap eternal life.'

Galatians 6:8

The present study has analysed in depth the different forms of corruption in public procurement in Bulgaria and the attempts to solve the problem by expanding the scope of the transparency principle. The focus of the study has been on Bulgarian legislation in the sector, with a detailed review of transparency rules and the participants and institutions active in public procurement. The types of infringements involving corruption schemes which are typical for the different award phases have been analysed in detail while their relationship to violations of the transparency principle is separately reviewed. The system of control and appeal against actions of contracting authorities has also been discussed in order to highlight weaknesses in current legislation which result in failure to reduce corruption. Some of the more significant theoretical achievements are also reviewed as well as the work of several institutions engaged in the fight against and the prevention of corruption in Bulgarian public procurement. A comparative analysis has been performed of the Bulgarian public spending system and that of two other countries (Germany and Austria) whose practice in the field of anti-corruption is examined in detail from the point of view of adherence to the transparency principle, or the use of other mechanisms to curb corruption, and the extent to which these practices could be applied in and adopted by Bulgaria is considered.

The conclusions drawn on the basis of this study can be organised in the following categories:

A) Relevance and efficiency of the transparency principle as an anti-corruption measure in public procurement award;

B) The role of control and appeal as an effective measure for prevention of corruption;

C) Good practices from Germany and Austria which could be applied in Bulgaria and the proper trend towards handling the problem of corruption in public contracts.

These are now considered in turn.

(A) The study clearly demonstrates the inability of the Bulgarian state to handle corruption in the public procurement sector using mainly the inflated function of publicity and transparency as a pillar of lawful and efficient award.

Transparency emerged in response to the need of society to fight corruption. It reflects the right of the public to have access to a certain level of information on norms, rules, procedures and regimes and the actions of participants, presented in an understandable and clear manner; the information provided should, at all times, be sufficient for monitoring, verification and assessment. The principle of transparency is strongly present in the regime of public procurement, where it has taken on certain specific characteristics. EU legislation sets out certain requirements of, and restrictions on, the parties involved in procurement procedures, with the aim of ensuring that the procedures are conducted in an open and fair manner. Some national legislations supplement these rules and develop an entire system aimed at ensuring transparent procedures (as is the case with Bulgaria), while other Member States keep to the level determined by the Procurement Directives.

An unresolved issue remains the lack of a common definition of transparency and the widely varying positions of the different states regarding the value of this principle. In particular, the Bulgarian approach to transposition of transparency rules shows a failure of understanding as well as a failure of the numerous attempts to put this principle in motion. The continuous increase in transparency rules and the ever more complicated legislative basis has been examined and analysed in the course of this research. It has become patently clear that Bulgarian

legislation abounds in rules imposing 'absolute transparency' of award procedures, which sadly, often overlap in both meaning and application, requiring that the entire dossier of a public procurement (up to and including the final letter of the contracting authority) be published on at least three different platforms, while part of this dossier must be maintained for years. Yet the EU claims that corruption in Bulgaria is increasing and the heavy transparency obligations imposed on contracting authorities act purely as a burden on the award process. The outcome ultimately differs considerably from the desired result – the contractor selection process is heavily obstructed, the administrative apparatus labours under the numerous transparency rules, while corruption itself remains undisturbed. Hence, where the process does indeed require clarity and direct monitoring (for example during contract implementation by the selected contractor), the legislation turns out to be impotent.

In addition, this part of the study offers (in chapter 2) a detailed historical and social overview of corruption in Bulgaria as misuse of public office for private gain, in order to establish the national specifics of the phenomenon and to identify its typical manifestations at the different award phases. The overview of the origin and development of corruption worldwide and the focus on Bulgaria outlines the main specifics of corruption in public procurement. This description of corruption in Bulgaria comes handy in the course of the comparative analysis with the other two Member States, drawing logical and objective conclusions as to which elements of the German and Austrian award systems have proved effective as anti-corruption practices, but remain inapplicable and would not bring about the desired result in Bulgaria. Furthermore, examples are provided of completely imprudent legislative decisions, ostensibly introduced for the purpose of fighting corruption, but existing only *pro forma*, without achieving any success in that direction.

The conclusions regarding the unrealistic expectations from transparency as the main principle in public procurement are supported by an examination of theoretical developments and the work of certain institutions in their attempts to identify a successful method for preventing corruption in the award process. The pilot project of the Integrity Pact of Transparency International in Bulgaria also demonstrates tolerance towards publicity as a method for combating corruption. The Pact is a voluntary act for additional monitoring and openness to the public of the

process of awarding. The sanctioning aspect for failure to fulfil the commitments undertaken under the Pact, however, is minimized and shifted to the background at the expense of the incentive aspect. A White Paper listing contractors demonstrating proper behaviour has been proposed. The pilot implementation of the Pact shows that the model is a far cry from being a pillar against the severe corruption problems in the implementation of public procurement procedures in Bulgaria. Many elements of the rules of the Pact are unclear and, although they do encourage greater publicity and strengthening of internal control, corruption loopholes (as evidenced by the analysis) remain open. What is more, increasing the punitive element in the implementation of the Pact in Bulgaria is of utmost importance to provide the missing disciplining effect of the Pact, as is demonstrated by the comparison with the German model of such pact.

In addition to the analysis of the pilot project of the Integrity Pact of TIBG, the analysis of other institutions working in the same direction turned out to be of particular importance for the present study and helped highlight the main conclusions drawn by the analysis. Particularly relevant is the comparison between the work of the TIBG and the CPCCOC, which have certain similarities (both projects claim to offer an effective solution to reduce corruption in public procurement; they use basically the best anti-corruption practices of the Republic of Germany). The approach of the two institutions, however, is completely antipodal, with the TIBG clearly championing for increased trust between participants in the procedure and sufficient transparency, while the CCCPOC model offers measures that are far more radical and practical. A large part of the CCCPOC proposals are definitely applicable and also conform to the requirements of the New Procurement Directives. They highlight the European trend of focusing on other methods against corruption (*e.g.*, promoting electronic procurement, strengthening the role of central procurement bodies *etc.*). Although somewhat untimely and expensive for Bulgaria at present, CCCPOC proposals are highly constructive and demonstrate the trend of an anti-corruption policy which does not rely on stretching the transparency principle beyond recognition.

The most significant part of this research which succeeds in demonstrating the broken link between transparency and corruption and which illustrates where the gravest corruption ‘ulcers’ in the process of

public procurement award occur, is the infringements analysis (presented in chapter 5). The list of infringements occurring in the course of the four phases of public procurement procedures (as defined by the author of the study, namely - the Choice of Object Phase, the Announcement Phase, the Procedure Conduct Phase and the Contract Implementation Phase) can always be supplemented with other types of corrupt practices and specific infringements of the law or combinations thereof depending on the type of procedure selected or the exact phase in which they occur.

According to the First EU Anti-Corruption Report 2014, the following types of infringements are most common:

> 'Bulgarian respondents from the business sector perceive the following practices as being widespread in public procurement: involvement of bidders in the design of specifications (36%), unclear selection or evaluation criteria (49%), conflicts of interests in the evaluation of the bids (57%), specifications tailor-made for particular companies (58%), abuse of emergency grounds to justify the use of non-competitive or fast-track procedures (33%) and collusive bidding (41%). 66% considered that corruption is widespread in public procurement managed by national authorities (EU average: 56%) and 78% thought this was the case with local authorities (EU average: 60%).'[1]

Analysing the different types of infringements and their occurrence in the four phases, the following conclusions are underscored:

Against the background of overly complicated and heavily bureaucratized procedures imposed by Bulgarian procurement legislation, as well as the numerous additional transparency obligations (summarized in chapter 1), most of the infringements which open up corruption loopholes are carried out in strict observance of publicity and transparency principles. In this context, a large portion of professedly impeccable procedures turn out to be precisely those in which 'grand corruption' is perpetrated, with the subsequent loss of significant financial resources. Some of the infringements (especially those occurring at the Choice of

[1] *First EU Anti-Corruption Report*. (2014), Brussels COM(2014) 38 final, Annex 2 - Bulgaria, p. 10.

Object Phase), such as contractor selection in the absence of a procurement procedure, or splitting of procurements in the absence of legal prerequisites are relatively easy to detect. This is largely due to the fact that they are linked to complete lack of publicity and occur directly outside legal rules. These infringements, however, are usually forms of 'petty corruption' and can be observed in smaller organisational units/contracting authorities (*e.g.*, municipalities).

In the remaining three phases transparency rules are either strictly observed or are altogether absent (*e.g.,* in the case of infringements in contract implementation). The procedure runs as advertised, *e.g.*, in the public procurement register, the Official Journal of the EU, the buyer's profile and a national daily newspaper. Despite all this, the procedure contains discriminatory requirements or provides a loophole for selection of the only possible candidate, or the contract is implemented in complete disregard of contract parameters. The methodology of infringement analysis adopted by the author (*i.e.*, (i) description of infringed national and EU provisions; (ii) description of the infringement itself; (iii) violation of transparency rules, if any; and (iv) the types of corruption loopholes opened) clearly highlights the prevalence of those infringements which open up significant corruption loopholes and which have, professedly, complied with all procedural and transparency rules. This once again confirms the conclusion that publicity is not a panacea against bribery and the selection of a 'favoured candidate' to the disadvantage of competitors.

(B) The analysis reveals that at national level the administrative part of the procedure is deemed to have greater significance than the subject matter of the procedure. This view strongly influences how control over public procurement award and execution is carried out.

Control bodies only monitor strict observance of the law and of the specific set of documents required by contracting authorities. The lack of human resources and financial capacity of control bodies hinders the detection of intricate corruption schemes including deliberately convoluted technical requirements or intricate evaluation methodologies. Infringements often remain undisclosed. Yet, even when detected, many of these infringements are penalized by means of fines which are

disproportionately lower than the actual loss for society. Verdicts are far too rare to have a preventive effect on corrupt schemes. In reality, fiscal damage, restriction of competition, market distortion and the disillusionment of a large portion of candidates who no longer wish to participate in public procurement procedures, cause damage to the state which cannot be compensated through sanctions, unless these sanctions can ensure reduced corruption in the sector.

Control and appellate authorities are analysed in detail in chapter 3, again with view of their effectiveness to detect corruption, guided only (in most cases) by a review of the legality and transparency of acts and decisions of the contracting authority.

It is apparent from the study that the relationship between the separate authorities and their functions is extremely complex, partly because of the Procurement Directives themselves, but partly because of the choices of the Bulgarian legislator. There is also a trend towards expanding the circle of contracting authorities under the PPA.

Most of the institutions – the PPAgency, PFIA, CPC and SAC basically exercise control of the legality of contracting authority actions. All procedural rules are exclusively and strictly observed in line with the basic principles of public procurement and reports on the inaccuracies admitted by contracting authorities are presented on an annual basis. In recent years, there has been significant progress towards greater transparency in the actions of contracting authorities and individual bodies. The annual reports of controlling institutions reveal a higher degree of accountability in the actions of participants in the procedures. However, this does not prevent candidates and contracting authorities from devising increasingly inventive corruption schemes in order to ensure that the desired candidate will come out on top.

In addition, the structure of control and appellate authorities is too burdensome and multi-instanced. Some of the institutions have poorly defined powers to interfere in, or to improve the procurement process. *Ex ante* control is concentrated mainly in the powers of the Executive Director of the PPAgency and is severely restricted in scope. Ongoing control is implemented internally, is insufficiently independent and manages to prevent corruption at the lower and middle level of administration only. *Ex post* control is organised in a highly fragmented

manner between the different authorities and is unable to achieve serious results in exposing corruption and infringements. The PFIA has greater responsibilities, but is limited to the implementation of legality control only (monitoring mainly conformity with procedural rules). The NAO has the authority to analyse the efficiency and effectiveness of the awards but not to respond to alerts and signals. Unfortunately, the actual operation of this auditing authority up to the present moment is negligible due to constant restructuring and changes in functions, and due to its being an object of political manipulations. Finally, the appellate authorities – the CPC and the SAC – also focus only on compliance with the letter of law and have neither the competence nor the expertise to detect corruption schemes hidden, *e.g.*, in the requirements of seemingly procedurally-sound and transparent procurements.

Last but not least it is important to underline the lack of independence of control and appellate authorities from the executive power. This factor definitely affects the efficiency and the meaningfulness of control which is expected to have a preventive and disciplining effect on participants in the award process and to dissuade them from using corrupt schemes. Lack of independence has a demotivating effect on eliminated or losing candidates, reflected in the reduced number of appeals which is quite low anyway. From this point of view, and although this conclusion goes beyond the scope of a purely analytical look at the regulation of public procurement in Bulgaria, it is evident that so long as there is no political will for effective functioning of the control apparatus so that faith in this apparatus could be restored, corruption will not be curbed; on the contrary, it will continue to take advantage of the currently thriving impunity.

It is furthermore evident from the analysis of the participants in the award process, of control and appellate authorities and of the most common infringements revealing corrupt intent, that against the background of strictly observed procedural rules, public administration in Bulgaria is not effective. It is inadequate and insufficiently familiar with European standards. The level of technical and professional qualification of individual contracting authorities is, in most cases, also completely inadequate to address the proposed modern measures and the legislative framework in the area of public procurement cannot be made fit for the purpose by further ‘experiments’.

Therefore a radical change of legislation is needed, which is expected with the transposition of the New Procurement Directives. The deadlines for introduction of operating e-procurement are not all that distant, given the situation in Bulgaria, as well as the purely economic difficulties which the state is likely to encounter in its attempts at successful and widespread implementation. Efforts should therefore be concentrated in that direction. In this connection, a review of one of the latest changes to the Bulgarian PPA once again demonstrates that the acts of the legislator run counter to all logic. Probably under pressure from EU criticism, the PPA attempts to implement some of the rules set out by the new procurement package although transposition of the full package is expected to require a cardinal change in legislation in the field. The PPA, which already suffers from excessive and ambiguous rules and obligations, has been burdened with several of the obligations of the state in the transition to e-procurement. This, in reality, is a step in the wrong direction – commencing with those rules, for which the New Procurement Directives has set the deadline for as late as 2018. Some platforms have been covered, such as e-Audit, e-Catalog; the obligation for each document to be uploaded on the buyer's profile was also envisaged. All these measures were once again introduced for the sole purpose of demonstrating the will of the government to enhance transparency in the sector. They have, however, had a detrimental effect on the practical side of the award process because some of the new rules have only managed to increase the pressure on contracting authorities while others still exist only in writing and have no actual effect. More or less none of the newest changes seems to have had any significant effect on corruption.

(C) Against the obviously unsuccessful attempts of the Bulgarian legislator to create a system of flexible and simple rules, interlinked with a functioning public spending control system and to fight corruption in the sector, the comparative analysis with the German and the Austrian model demonstrates precisely how this can be done more successfully. Not all solutions used by these two countries are applicable and/or acceptable for Bulgaria, but some of them are completely conventional and objectively successful methods to improve the procurement process and deal with manifestations of corruption.

The analysis of the public procurement award system in *Germany* and its comparison with the current state of the Bulgarian system in terms of corruption and the measures against it, has resulted not only in highlighting good German practices which could be borrowed by Bulgaria but also in a more comprehensive outline of the elements absent in the Bulgarian model.

The main conclusion drawn from this comparison is that regardless of the legislative changes needed and regardless of how public spending is regulated, a key factor is the *actual* implementation, control and sanctioning effect of these norms. Efficient and preventive measures against corruption in the award process can be defined as comprehensive only when combined with an efficient judicial system and only where there is a much larger number of anti-corruption proceedings initiated and concluded with an enforceable judgment. This means that the legislative changes that can be borrowed from Germany comprise only a small portion of the weapons needed in the fight against corruption in public procurement – undeniably an important portion, but not the only one.

Germany, however, is an invaluable example which Bulgaria can follow not only with view of its legislative framework, which is rather more schematic, mainly outlining essential terms, rights and obligations – but also with view to its application in practice. Instead of translating a huge number of transparency rules into statutory norms which fail to limit corruption (as can be seen in Bulgaria), Germany has opted for methods which facilitate publicity but also allow control over the activities of both contracting authorities and contractors. A good example in this direction are the electronic platforms for e-procurement which are constantly being developed. Restricting the human factor is hugely important for a corruption-free environment and is definitely a good practice which should be borrowed at all costs, and the financial resources should be allocated as soon as possible instead of pouring nonsensical criticism against investment in software and e-platforms.

Another important element is the efficient institutional apparatus in Germany. The entire award and implementation stage of public procurement in Germany depends on the well-oiled administrative apparatus, which exercises control over the activities of contracting authorities and sanctions any irregularities in good time. In addition, the

efficient judicial system and the National Court of Auditors act as controlling and sanctioning bodies; they have a restraining and disciplining effect on all participants in the award and implementation process.

An active central purchasing body is a viable option and its functioning could commence simultaneously with the changes in Bulgarian legislation upon transposition of the New Procurement Directives. The experience in Germany shows that such well-functioning mechanism limits subjective contracting authority-candidate relations as well as the relationship between contracting authority and bidders. Separation of the functions of the actual user of the goods, services or supplies from those of the entity carrying out and controlling the procedure introduces a very active element into the procedure which, in addition to serving as a safeguard against potential corrupt intent, is also an additional control body with regards to the entire procedure. What is more, according to the New Procurement Directives, central purchasing bodies will be the first to move onto complete e-procurement (by 2018); this will further strengthen the anti-corruption element of their functions by not only mediating the award process on behalf of the contracting authority, but also by limiting the human factor in the selection process.

Although the option for central purchasing bodies is not recent and has already been introduced into the Bulgarian PPA from European legislation, its application in Bulgaria is at present almost non-existent and completely inadequate. This is why the German model is so relevant and why adoption of this model would serve as a positive start in the fight against corruption. The introduction of such a scheme requires substantial restructuring and reorganisation of the existing model, both in Bulgaria as a whole and in the separate municipalities, acting as contracting authorities. If, however, such a separation between contracting authorities and potentially bribing bidders could be accomplished, these efforts would be fully justified.

In addition to everything analysed and the good practices outlined, the comparative analysis between the Bulgarian and German award system and the implementation and control over public spending also serves to support the conclusion that ensuring transparency at every step and every action of the contracting authority is clearly not the key element in the fight against corruption in the sector. Indeed an adequate level of

information in the award process is a must, but Bulgaria needs to focus on ensuring a wider competitive environment, on flawless and timely control, and on the introduction of provisions with a clear disciplining action if it truly wishes to limit the handing out of public contracts to pre-selected candidates.

This aspect ought to be taken into account in the annual monitoring report of the EU for Bulgaria. The mantra of 'increasing transparency in public procurement' needs to be replaced by more constructive advice and analyses of the actual state of public procurements at legislative, but also practical level. Precisely from this point of view the German model is largely feasible and a positive example for Bulgaria. What is more, some of the significant achievements of Germany in the fight against corruption in procurement award underlie the New Procurement Directives. Hence the existing practice in Germany could help for faster adaptation of Bulgaria to some of the rules which will be completely novel for the latter. The analysis, however, also provides objective criticism of some of the new elements in the New Procurement Package, which, although effective for some countries, may prove supportive of corruption in Bulgaria (*e.g.*, the self-cleaning mechanism, the economically most advantageous tender as the sole award criterion).

The parallel drawn in the field of public procurement award and implementation in *Austria* is of great significance for the present analysis because both countries currently face difficulties in managing corruption and its prevention. This helps identify several different aspects and to draw different conclusions from those outlined in the course of the comparison to Germany. Austria is also much more similar in terms of legal system and regulation of public procurement in Bulgaria; this could be regarded as a good basis on which positive Austrian practices could be introduced in Bulgaria.

Although in a very different social and economic context and with a different CPI, Austria appears to have serious issues with corruption both among high-ranking officials and, more specifically, in public spending (these two aspects are often inextricably linked). Corruption scandals over the last few years have toppled Austria from its pedestal of a stable and upright business partner, while EU criticism on this issue now rings similar to that in the reports addressed to Bulgaria. Despite the similar

legislative framework for public procurement in the two countries, the analysis of the legislation and procurement award systems of Austria and Bulgaria reveals differences in their approaches and also in their attitude towards transparency rules as an anti-corruption instrument.

As opposed to the Bulgarian model, in its desire to improve the situation, Austria has embraced stricter legislative bodies and yet better-oiled policing-prosecution apparatus which has resulted in a large number of detected and prosecuted cases and effective sentences. The reforms launched by Austria differ significantly from those adopted by Bulgaria. While the Bulgarian PPA has suffered countless transformations, the corresponding Austrian law has undergone only a few small-scale amendments for the last five years, but Austria has seriously reorganised its control bodies in order to meet the needs of contracting authorities and contractors for independent control and a swift-acting judicial system. The Austrian public procurement agency also acts as the main central purchaser and serves as a positive example with its tailor-made strategy for combating corruption and its code of conduct applicable to all employees. This could be an excellent opportunity for Bulgaria to take advantage of the Austrian model and reorganise the PPAgency, so as to upgrade it from its current position of a body engaged mainly in the elaboration of award methodology.

The practical experience of the reorganised Austrian bodies is still not sufficiently long-standing, and their functions and responsibilities are expected to be further expanded with view of the New Procurement Directives. Yet even in their current format they demonstrate a positive change and a focus on the fight against corruption – in actual practice and not only ‘on paper’.

The legislative framework in the field of public procurement in Austria is not overly specific in terms of anti-corruption instruments created for this sector, but the increased control and broadened powers of the institutions are evidently able to achieve the desired effect. The Austrian law sets out the main instruments for the fight corruption as required by the Procurement Directives. In some respects there are national solutions which overlap with the requirements of the New Procurement Directives, although they are not as common as is the case with Germany. Some rules do mirror the Bulgarian approach as well, but

this is again due to the harmonised EU legislation and/or the historical similarities and not due to a specific approach of the domestic legislators.

The investigation into Austria's award system shows two main differences from Bulgaria's approach toward resolution of an equally grave problem – corruption in public resource allocation. Transparency rules are not an endless list in Austrian legislation as has been the case in Bulgaria in the last few years – on the contrary, transparency is achieved by means of a well-functioning administrative machine, functioning e-procurement and working control and appellate apparatus. On the other hand, trust in Austria's law enforcement system and its constant refinement and efficient action creates the biggest difference between the starting points in the fight against corruption in public contracts in the two countries.

Once again it is clear that well-functioning control bodies along with a considerable effort in limiting the human factor in procurement award are the proper approach to preventing and combating corruption in the sector. This conclusion is equally valid both for the current legal systems and for the situation following transposition of the new legislation package.

This analysis of anti-corruption policies, transparency rules and procurement award systems, as well as the highlighting of positive solutions adopted by other Member States, serves to set out the main recommendations for legislative and institutional measures which need to be undertaken towards reduced corruption in the sector:

– The legislative framework needs to be significantly lightened instead of being overwhelmed by superfluous, overlapping transparency rules; it needs to be transformed into a flexible, streamlined system of rules. From this point of view, transposition of the new procurement package needs to take into account the general anti-corruption policy and must carefully assess those rules which permit the discretion to the national legislature in order to ensure that they do not open up additional corruption loopholes given the national specifics of corruption in Bulgaria. Apart from this, the legislative network must contain a greater number of imperative rules and give

less discretion to the contracting authority with regards to the main decisions related to contractor selection;

- Decrease of corruption depends directly on the presence of disciplining sanctions, which need to be applied in a timely manner in order to create the perception of proper law enforcement and stability of the legislative and judicial systems. Such sanctioning norms should predominate over incentive norms. The number of initiated proceedings and detected corruption schemes must be greatly increased;
- Efficient and independent control of the appellate authorities needs to be established, designed specifically to prevent and detect corruption (*ex ante*, ongoing and *ex post*), as well as a designated body to drive the fight against corruption. The control system must exercise control both with regards to legality of procedures and regularity of implementation. In addition, control needs to focus both on the contracting authority and on the responsibility of other process participants;
- Appeal must automatically suspend contract implementation and this suspensive effect must also be supported by speedy proceedings so as not to halt the process of supply of goods and services required by the contracting authority;
- An increase in the role of central purchasing bodies is also expedient. Such central purchasing bodies serve as mediators in the award of standard procedures and increase the distance between contracting authorities and bidders, respectively, contractors;
- Reducing the human factor in the award process is a priority. This can be achieved by boosting the use of e-procurement and should be implemented in compliance with the provisions of the New Procurement Directives;
- The responsibility for the presence/absence of corruption in a given public contract should be proportionally distributed among all participants (generally the bribed contracting authority and bribing bidder), and rules need to be introduced concerning the actions of the individual candidates, with a strong disciplining effect (*e.g.*, the

European Single Procurement Document in the New Procurement Directives, to be provided by the tenderers);

- The audit office or auditing body must be a completely independent authority with much wider competence in the implementation of public procurement procedures. Such auditing authority needs to have significant expert capacity able to detect corruption schemes by means of audit analyses, and to act as a sanctioning body which may, in addition to administrative penalties, issue recommendations regarding contracting authority actions;
- The public procurement authority/agency needs to take on much wider functions, including that of an anti-corruption corrective and not only of a body responsible for methodological guidelines;
- Political will for adequate, functioning anti-corruption measures must be evident, while the actions of the executive power need to be consistent and efficient.

In the light of the above, the present research and comparative analysis ultimately demonstrates that the fight against corruption in the sector and the curbing of misuse of considerable public funds needs to be a national strategy focused on efficient policies against this phenomenon and not on the promotion of numerous palliative measures which fail to achieve the desired result.

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Samenvatting

Het onderhavige onderzoek omvat een analyse van de corruptie die plaatsvind bij openbare aanbestedingsprocedures in Bulgarije en de onsuccesvolle pogingen om dit probleem op te lossen door het toepassingsbereik van het beginsel van transparantie te vergroten. The focus ligt op Bulgaarse wetgeving in de sector waarbij er een gedetailleerde analyse plaatsvind van de regels die transparantie moeten bewerkstelligen, deelnemers aan het aanbestedingsproces en verantwoordelijke instellingen. De verschillende soorten van overtredingen die betrekking hebben op corruptie, welke typerend zijn voor de verschillende stadia van het gunningsproces, zijn besproken, evenals de wijze waarop zij het transparantie beginsel schenden. Het systeem waarbij toezicht op de contracterende publieke partij plaatsvindt en de beroepsmogelijkheden jegens diens besluiten in het huidige systeem worden geregeld is onderzocht, en de wetgevende zwakheden, welke falen in het bestrijden van corruptie, zijn belicht. Enkele van de meest betekenisvolle theoretische ontwikkelingen worden beoordeeld, even zo enige van de instellingen die zich bezighouden met de bestrijding van corruptie in Bulgaarse openbare aanbestedingen. Het Bulgaarse systeem van openbare aanbesteding wordt vergleken met dat van twee andere Lidstaten: Duitsland en Oostenrijk. De oplossingen die deze landen hebben ontwikkelt in de strijd tegen corruptie worden geanalyseerd in het licht van het transparantie beginsel en het gebruik van andere mechanismen om corruptie te beperken. Dit voor zo ver deze maatregelen passend zijn in het kader van hun toepasselijkheid in de Bulgaarse situatie.

De conclusies die getrokken kunnen worden zijn te verdelen in drie categorieën:

(a) de efficiëntie van het beginsel van transparantie als een middel voor corruptiebestrijding,

(b) de rol van toezicht en beroepsmogelijkheden als effectieve preventie maatregelen tegen corruptie,

(c) de beste werkwijzen welke in Bulgarije zouden kunnen worden toegepast kunnen worden om corruptie in openbare aanbestedingsprocedures uit te bannen.

Het onderzoekt brengt de grootste zwakten van een wetgevende systeem aan het licht. Een wetgevend systeem dat al vele veranderingen heeft ondergaan, maar nog niet is geslaagd om corruptie een halt toe te brengen. Het doel van dit werk is om het huidige beleid, aangaande het beginsel van transparantie als het cruciale element in de strijd tegen corrupte instellingen en de pre-toewijzing van openbare contracten, ten dele te ontmaskeren.

De meest voorkomende schending in de verschillende fasen van gunning en implementatie worden gedetailleerd in kaart gebracht in drie categorieën:

(i) beschrijving van de schendingen van nationale zowel als Europese voorschriften,

(ii) beschrijving van de schending zelf,

(iii) schendingen van de voorschriften aangaande transparantie, waar van toepassing,

(iv) de verschillende soorten van mazen in het systeem die worden geopend om corruptie een kans te geven.

Op deze wijze wordt aangetoond dat in het algemeen, uitingen van corruptie en schendingen van voorschriften niet voortkomen uit onvoldoende openheid van het proces. In het merendeel van de gevallen wordt het transparantie beginsel dan ook niet geschonden.

De werking van toezichthoudende organen en beroepsorganen wordt ook onderzocht. De inefficiëntie van deze organen wordt duidelijk blootgesteld. Tevens zijn deze organen zich absoluut niet bewust van de feitelijke activiteiten van deelnemers aan een aanbestedingsprocedure. Dit komt doordat zij feitelijk alleen zicht hebben op de rechtmatige toepassing van de procedure en vooral oog hebben op de procedurele vereisten.

De werkzaamheden van de voornaamste instellingen die zich richten op corruptie bestrijding in Bulgarije, worden tevens kritisch bekeken. Het resultaat van hun studies en projecten worden meegenomen in de overwegingen. Deze analyse benadrukt de conclusie dat projecten die afhankelijk zijn van publiciteit en toezicht om te kunnen functioneren, niet succesvol zijn in het corrupte klimaat waarin openbare aanbestedingen plaatsvinden in Bulgarije.

Een korte historische beschouwing van de Bulgaarse wetgeving aangaande corruptie bestrijding en openbare aanbestedingen illustreert de tendens tot een opeenstapeling van regels omtrent transparantie. Deze beschouwing toont ook de specifieke individuele en economische factoren aan die een rol spelen bij corruptie in Bulgarije. Als zodanig dient in het oog te worden gehouden dat alhoewel sommige van de conclusies en aanbevelingen in dit werk van toepassing zijn op aanbesteding in het algemeen, een aantal hiervan zich specifiek richten op de situatie in Bulgarije.

De vergelijkende analyse met betrekking tot aanbesteding procedures in Duitsland en Oostenrijk, specifiek aangaande het daar bestaande anti-corruptie beleid, heeft tot doel om aan te tonen dat de wetgeving in deze landen zich niet richt op omslachtige noodzakelijke vereisten die bedoeld zijn om openbare aanbestedingen tot publieke kennis te maken. Noch leunen deze landen op het beginsel van transparantie in de strijd tegen corruptie. Alhoewel alle drie de besproken landen Lidstaten van de Europese Unie zijn en daarmee wetgeving baseren op Europese Richtlijnen, hebben zijn elk een andere keuze gemaakt over de balans tussen ‘de hoeveelheid transparantie bevorderende regels en de kwalitatieve preventie van corruptie’. Het is vanwege deze afweging dat het belangrijk is om een overzicht te maken van de beste werkwijzen die voorkomen in deze landen, niet alleen omdat deze zich tot voordeel van Bulgarije kunnen strekken, maar ook omdat deze voor andere landen van belang kunnen zijn in de strijd tegen de onder-de-tafel verwerving van gunningen.

Duitsland en Oostenrijk zijn onderzocht op basis van de voornaamste wetgevende regels aangaande de regulering van openbare aanbestedingen en de bestaande regels over transparantie met betrekking tot de gunningsprocedure. De voornaamste wetgevende en institutionele middelen in de bestrijding van corruptie worden tevens uitgelicht. De hieruit voortkomende werkwijzen die in deze landen succesvol blijken en ook zouden kunnen worden toegepast in Bulgarije worden expliciet belicht, alsook de succesvolle oplossingen die niet geschikt zijn voor de Bulgaarse situatie.

De bovengenoemde rechtsvergelijking heeft tevens het doel om een richting te duiden in welke de Bulgaarse systematiek omtrent openbare

aanbesteding zich dient te ontwikkelen. De conclusie wordt getrokken dat het nodig is om een aanzienlijke versimpeling van de bestaande procedures teweeg te brengen. In plaats van een niet functionerend systeem van transparantie gerelateerde regels, dient er een systeem te worden ingesteld waarbij het proces duidelijker van aard is en er geen mazen meer zijn waarbij voorgeselecteerde kandidaten zich in het proces kunnen mengen.

De Nieuwe Richtlijnen over Aanbesteding worden tevens door dit onderzoek geanalyseerd. Alhoewel deze nog niet zijn geïmplementeerd in de besproken landen en er nog geen toepassing van deze regels zich in Europa heeft plaatsgevonden, maakt de tekst van de Richtlijnen het mogelijk om enkele conclusies te trekken met betrekking tot de heersende praktijk. Daarom is het mogelijk om een schatting te geven van de mate waarin het anti-corruptie beleid van de besproken landen gaat beïnvloeden.

De onderhavige studie behelst een breedspectrum analyse van de drie verschillende wetgevende oplossingen omtrent openbare aanbestedingen. Elke oplossing richt zich (elk op zijn eigen wijze) op de strijd tegen en de preventie van corruptie tijdens de keuze van een contractant. De parallellen die kunnen worden getrokken tussen de regels zoals deze bestaan in Bulgarije en de regels in Duitsland en Oostenrijk resulteert in bevindingen die kunnen bijdragen in zowel de strijd tegen corruptie op een nationaal niveau, als in de creatie van een meer geschikt en effectief anti-corruptie mechanisme op Europees niveau. Daarom is dit onderzoek relevant, niet alleen op het niveau van het specifieke rechtssysteem dat onderzocht is, maar ook met betrekking tot andere landen waar overheidsuitgaven structureel worden bedreigd door corruptie.